IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AL-HARAMAIN ISLAMIC FOUNDATION, INC., *et al.*, Plaintiffs/Appellees, v. GEORGE W. BUSH, President of the United States, *et al.*, Defendants/Appellants.	)	No. 06-36083

APPELLANTS' MOTION FOR STAY OF THE DISTRICT COURT'S MARCH 13, 2007 ORDER PENDING THIS 28 U.S.C. 1292(B) APPEAL, AND FOR AN IMMEDIATE, INTERIM STAY PENDING THIS COURT'S CONSIDERATION OF THIS STAY MOTION

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INTRODUCTION AND SUMMARY

The United States seeks a stay here because of a district court order requiring the Government to continue litigating a matter, even though doing so would put directly at issue the precise state secrets privilege questions that this Court is currently considering in this interlocutory appeal, which urges that dismissal of the entire action is required. We also request that this Court issue an immediate, interim stay of the district court's order pending its consideration of this stay motion.

This is a state secrets privilege case in which this Court, in December 2006, granted the Government's petition for interlocutory appeal under 28 U.S.C. 1292(b) from the district court's September 2006 ruling declining to dismiss plaintiffs' action. By order of March 13, 2007, the district court has now required the Government to respond to plaintiff's partial summary judgment motion on liability by April 12, 2007, and has calendared the motion for a hearing on May 3, 2007. See Tab 1. We respectfully move for a stay of the March 13 order pending this appeal. The court's unexplained order requiring this litigation to proceed is flatly inconsistent with the Government's petition for interlocutory appeal—granted by this Court—which argues that this entire case must be dismissed because its very subject matter is a state secret. This Court's acceptance of the interlocutory appeal divested the district court of jurisdiction over the same issues, and allowing the case to proceed would improperly risk disclosing classified information.

Plaintiffs initially filed this case in the District of Oregon, alleging that, in March and April of 2004, they had been subject to unlawful Presidentially-authorized foreign intelligence surveillance, and seeking damages and equitable relief. The Government formally invoked the state secrets privilege, and moved to dismiss, because plaintiffs cannot establish standing or a *prima facie* case, and the Government cannot seek to refute standing or defend the case on the merits, without disclosing state secrets. In a September 2006 ruling, the district court refused to dismiss this suit, relying on the fact that plaintiffs had inadvertently been shown a classified document, and were entitled to attempt to prove standing and a *prima facie* case based on their recollection of its contents. This Court *granted* interlocutory review in December 2006.

Meanwhile, the Judicial Panel on Multidistrict Litigation transferred this case to the Northern District of California. On March 13, 2007, the latter court, without explanation, issued the order that is the subject of this stay motion, compelling the Government to respond to plaintiffs' partial summary judgment motion on liability.

A stay of the March 13 order is plainly warranted. This interlocutory appeal, accepted by this Court under 28 U.S.C. 1292(b), raises the threshold question whether this entire case must be dismissed in light of the state secrets privilege. The district court had no authority to force the Government to proceed with the trial court litigation notwithstanding its pending—and potentially dispositive—appeal.

Moreover, further litigation is itself a risk to national security, which is why the Government petitioned for immediate appeal in the first place.

The balance of hardships and the public interest weigh heavily in favor of a stay. While denial of a stay would result in this case going forward in the district court, thereby improperly proceeding with an adjudication that the United States contends would risk disclosing classified information, granting the stay would cause plaintiffs no countervailing harm. The foreign intelligence gathering program under which plaintiffs allege they were subject to surveillance—the Terrorist Surveillance Program (TSP)—no longer exists; any claim for injunctive relief against that program is therefore no longer available. To the extent plaintiffs' remaining damages claims for alleged past harm remain viable, plaintiffs would suffer no prejudice from a stay, which would simply allow this Court properly to resolve the threshold and potentially dispositive state secrets issues that are the subject of this appeal.

We also ask this Court for an immediate, interim stay pending its consideration of this stay motion. Summary judgment proceedings may not proceed in the district court while the Government's threshold motion to dismiss is before this Court on interlocutory appeal, and those proceedings should be held in abeyance while this Court considers this stay motion.[1/]

1/ As discussed below, the Government in October 2006 filed a district court motion for a stay of proceedings in this case pending the 28 U.S.C. 1292(b)

STATEMENT

1. Plaintiffs are Al-Haramain Islamic Foundation, an Oregon corporation that has been designated by the Treasury Department as a "Specially Designated Global Terrorist," and Wendell Belew and Asim Ghafoor, two attorneys with "business and other relationships with plaintiff Al-Haramain." See Complaint ¶¶ 1, 4-6, 21 (Feb. 28, 2006). After various media stories appeared concerning asserted post-9/11 foreign intelligence activities, plaintiffs filed this action in the District of Oregon against the President, the National Security Agency (NSA), and other federal agencies and officials. Plaintiffs allege that they were subject to electronic surveillance under the TSP, and that such surveillance violated the Constitution. Plaintiffs additionally contend that the alleged surveillance violated the Foreign Intelligence Surveillance Act, 50 U.S.C. 1801 *et seq.*, and the International Convention for the Suppression of Financing of Terrorism. See Complaint ¶¶ 16-37.

Plaintiffs' allegations arose from the President's December 2005 public revelations that he had authorized NSA to intercept international communications of persons with known links to al Qaeda and related terrorist organizations. See *Al-*

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proceeding, and the Government argued that motion at a February 2007 district court hearing. The requested stay relief was effectively denied in the March 13, 2007 order. Simultaneously with the instant motion, we are also filing a motion in district court asking the court to stay its March 13 order pending this Court's consideration of this stay motion. We are doing so to facilitate this Court's consideration of the matter, and we will promptly advise this Court of any action the district court takes.

Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215, 1218 (D. Or. 2006). The President took this step pursuant to his Commander-in-Chief powers, as well as under Congress's 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224. The Attorney General confirmed that NSA was authorized under the TSP to intercept the contents of international communications to or from the United States when the Government had reasonable grounds to conclude that one communicant was a member or agent of al Qaeda or an affiliated terrorist organization. See 451 F. Supp. 2d at 1218, 1222.[2]

2. In response to plaintiffs' complaint, the Government asserted the state secrets privilege, and moved for dismissal or summary judgment. See Motion to Dismiss Or, In the Alternative, For Summary Judgment (June 21, 2006). The privilege, which must be invoked by the pertinent agency head, requires dismissal whenever "there is a reasonable danger" that disclosing information in court proceedings would harm national security interests, such as by disclosing intelligence-gathering methods or capabilities. See *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998). Dismissal is required if the action's "very subject matter" is a state secret, or if the plaintiff cannot prove a *prima facie* case, or the defendant cannot establish a valid defense, without information protected by the privilege. See *ibid.*

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[2] The TSP is no longer authorized. On January 17, 2007, the Attorney General publicly advised the Senate Judiciary Committee that, "on January 10, 2007, a Judge of the Foreign Intelligence Surveillance Court issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. As a result of these orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court." See Tab 2. "[U]nder these circumstances, the President has determined not to reauthorize the Terrorist Surveillance Program when the current authorization expires." *Ibid.* TSP surveillance is thus no longer authorized by the President or conducted by NSA.

The Government's dispositive motion was supported by public and classified declarations of the Director of National Intelligence and the NSA Director. The Government also filed public and *ex parte/in camera* briefs, arguing that litigation of plaintiffs' claims threatened disclosure of intelligence information, sources, and methods. See Mem. Of Points & Auth's. In Support of Motion (June 21, 2006). The Government asserted that the very subject matter of this case is a state secret; that dismissal is required because state secrets are needed for plaintiffs to litigate their claims (including their ability to establish standing); and that the Government could not defend itself without disclosing state secrets. In so arguing, we made clear that the Government could neither confirm nor deny whether plaintiffs were subject to the foreign intelligence gathering activities alleged in the complaint. We showed as well that adjudication of whether the surveillance alleged by plaintiffs had been conducted lawfully would also entail disclosing state secrets. See *ibid.*

3. On September 7, 2006, the district court denied the Government's motion to dismiss. *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or.

2006) (Tab 6). Critical to the court's ruling was the fact that plaintiffs had reviewed a classified document that they claim shows they were subject to TSP surveillance. *Id.* at 1223-25. In particular, plaintiff Al-Haramain Islamic Foundation has been designated by the Department of Treasury as a "Specially Designated Global Terrorist" for providing support to al Qaeda, and has been similarly designated by the United Nations Security Council, and plaintiffs claim that a classified document inadvertently revealed to them by the Treasury Department during the designation process shows that plaintiffs Belew and Ghafoor, and a director or directors of Al-Haramain, were subject to warrantless electronic surveillance by NSA in March and April of 2004. See *id.* at 1218-19. The district court decided that plaintiffs could proffer evidence regarding their recollection of the contents of the classified document to prove their standing and the merits of a *prima facie* case.

The district court initially concluded that the unauthorized release of a highly classified Government document to plaintiffs "did not waive [the] state secrets privilege" or declassify the content of the document, which the court recognized "remains secret." *Id.* at 1223, 1228. The court thus found that "whether plaintiffs were subject to surveillance" is a factual matter that "remains secret." *Id.* at 1223. However, the court reasoned that "it is not a secret to plaintiffs whether [or not] their communications have been intercepted" if one accepts plaintiffs' contention that the classified document they reviewed shows that such surveillance of plaintiffs had occurred. *Id.* at 1223. Because plaintiffs "know what information the Sealed Document contains," the court reasoned, "no harm to the national security would occur if plaintiffs are able to prove the general point that they were subject to surveillance as revealed in the Sealed Document." *Id.* at 1223-24.

On this basis, the court concluded that the "very subject matter of this litigation"—whether the NSA conducted surveillance of plaintiffs under the TSP—is not a state secret that would require dismissal if plaintiffs can prove that "the Sealed Document demonstrates that they were under surveillance." *Id.* at 1224-25. The court further ruled that "plaintiffs should have an opportunity to establish standing and make a *prima facie* case" by submitting *in camera* affidavits "attesting to the contents of the document from their memories." *Id.* at 1226, 1229.

The court *sua sponte* certified its order under 28 U.S.C. 1292(b). *Id.* at 1233. The court explained that its decision involved "'a controlling question of law' about which there is 'substantial ground for difference of opinion,'" and that interlocutory appeal "'may materially advance the ultimate termination of this litigation.'" *Ibid.*

4.a. Pursuant to the district court's invitation, the Government petitioned this Court for permission to take an interlocutory appeal under 28 U.S.C. 1292(b). See Tab 5. This Court *granted* the petition on December 21, 2006. See Tab 4.

On January 9, 2007, this Court granted the Government's further request that the appeal be held pending this Court's resolution of *Hepting v. AT&T Corp.*, Nos.

06-17132/17137. See Tab 3. *Hepting*, like this case, involves an order, certified by the district court and this Court under § 1292(b), declining to dismiss on state secrets grounds a complaint challenging alleged TSP surveillance (*Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006)). The parties in *Hepting* sought expedition in this Court, and opening appellate briefs in *Hepting* were filed on March 9, 2007.

b. Meanwhile, on December 15, 2006, the Judicial Panel on Multidistrict Litigation transferred this case to the Northern District of California, where this case and *Hepting* are now part of the same Multidistrict Litigation (MDL) proceeding. See *In re NSA Telecomm. Records Litig.*, MDL No. 06-1791 (N.D. Cal.). On February 9, 2007, the district court in the MDL matter held a hearing on, *inter alia*, the Government's pending motion, filed in October 2006, to stay trial court proceedings in this case pending the 28 U.S.C. 1292(b) proceeding.

On March 13, 2007, the MDL court issued the order that is the subject of this stay motion: the court set a briefing schedule in this case for plaintiffs' motion for partial summary judgment on liability, requiring the Government to respond by April 12, 2007, and setting a hearing for May 3, 2007. See Order, MDL No. 06-1791 (Mar. 13, 2007) (Tab 1). In issuing the March 13 order, the court made no mention of the Government's stay motion, and gave no reasons for rejecting the Government's arguments that plaintiffs' summary judgment motion could not and should not proceed in light of this Court's certification of the district court's threshold state secrets decision for immediate appeal. See *ibid.*

REASONS WHY THE DISTRICT COURT'S MARCH 13, 2007 ORDER SHOULD BE STAYED PENDING THIS 28 U.S.C. 1292(B) APPEAL

The district court has no jurisdiction to proceed with plaintiffs' summary judgment motion while the Government's threshold motion to dismiss—implicating the same state secrets issues—is pending before this Court on interlocutory appeal. A stay should issue for this reason alone.

Moreover, assuming that the normal stay standards apply in the circumstances of this case, a stay is plainly warranted. Under those standards, "the moving party must demonstrate either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in the moving party's favor." *Beltran v. Myers*, 677 F.2d 1317, 1320 (9th Cir. 1982). The relative hardship to the parties is critical. *Benda v. Grand Lodge of Int'l Ass'n of Machinists*, 584 F.2d 308, 314-15 (9th Cir. 1978). The public interest must also be considered. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983), *rev'd on other grounds*, 463 U.S. 1328 (1983).

A. The Government's Pending Appeal Presents Dispositive Threshold Questions, And The District Court Has No Authority To Proceed With This Case In Derogation Of This Court's Jurisdiction.

1. A party's "application for an [interlocutory] appeal" under § 1292(b) will not, by itself, "stay proceedings in the district court." See 28 U.S.C. 1292(b). Once the petition is granted by the court of appeals, however, a stay will normally be warranted because the order granting permission to appeal immediately "divests the district court of jurisdiction over the particular issues involved in that appeal." See *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001).

Indeed, this Court has made clear that "jurisdiction is transferred from a district court to a court of appeals" upon the filing of a notice of appeal or, in the section 1292(b) context, "upon the issuance of an order by a court of appeals permitting an appellant to bring an interlocutory appeal." See *id.* at 885-86 (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)); see also *Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co.*, 906 F.2d 1059, 1063 (5th Cir. 1990). Once an interlocutory appeal is perfected, the district court retains limited authority to "'preserve the status quo'" during the appeal, but may not adjudicate "'substantial rights directly involved in the appeal.'" *McClatchy Newspapers v. Central Valley Typographical Union*, 686 F.2d 731, 734-35 (9th Cir. 1982); see *In re Padilla*, 222 F.3d 1184, 1190 (9th Cir. 2000). When an interlocutory appeal involves issues relevant to "the scope of [a party's] defenses," the district court is "without jurisdiction" to adjudicate claims to which those defenses may relate. See *Pyrodyne Corp. v. Pyrotronics Corp.*, 847 F.2d 1398, 1403 (9th Cir. 1988).

Against this backdrop, even absent an order explicitly staying district court proceedings, the district court's authority to proceed is highly circumscribed once the court of appeals obtains jurisdiction under 28 U.S.C. 1292(b). The "'trial court thereafter has no power to modify its judgment in the case or proceed further [on the matters on appeal] except by leave of the Court of Appeals.'" See *Santa Monica Baykeeper*, 254 F.3d at 886.

2. In its March 13, 2007 order, the MDL district court has improperly exerted authority to adjudicate matters that are at the heart of the Government's pending appeal. While there may be "*some* interlocutory appeals under 28 U.S.C. § 1292(b) that challenge discrete orders that can be carved out and isolated from the remainder of the case," *Stewart v. Donges*, 915 F.2d 572, 576 (10th Cir. 1990) (emphasis added), this case is manifestly not one of them.[3/]

The Government's pending appeal addresses the critical threshold question whether the district court erred in failing to dismiss plaintiffs' case because the "very subject matter of this litigation is a state secret" and "adjudicating each of plaintiffs' claims would, among other things, require confirmation or denial of whether plaintiffs have been the targets of alleged intelligence activities." Gov. Pet. at 12 (Tab 5). Because "every step in this case—for plaintiffs to demonstrate their standing by showing that they were subject to surveillance, for plaintiffs to prove their claim that

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[3/] Cf. *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 & n.7 (9th Cir. 1990) (district court retained authority to adjudicate "independent issues presented in the underlying case" where the "only substantive issue presented" on interlocutory appeal was "easily severable" from those issues).

such surveillance was unlawful, or for the Government to defend against such contentions—would immediately require privileged information" the public disclosure of which would "caus[e] exceptionally grave damage to national security," the Government's 28 U.S.C. 1292(b) petition made clear that immediate interlocutory review was necessary because "it would vitiate the privilege to permit this action to proceed further" in district court. *Id.* at 12-13. Not only did the district court recognize that such a challenge to its order presented "'substantial'" questions involving a controlling question of law, 451 F. Supp. 2d at 1233, but this Court's order granting the Government's petition also necessarily reflects that this appeal involves "substantial" questions whose immediate resolution by this Court would "materially advance the ultimate termination of the litigation" (28 U.S.C. 1292(b)).

To permit the district court to now adjudicate plaintiffs' summary judgment motion on liability would compel the Government to reassert or rely upon the same state secrets privilege assertion that is now on appeal. Until the threshold state secrets privilege issue is decided by this Court, the Government must continue to protect the information at issue on appeal, and therefore cannot fully address the merits of plaintiffs' claims. To the extent the district court contemplates that the merits must now be fully addressed, the Government would be put in the untenable position of either defending the litigation without recourse to classified information and, by doing so, providing an incomplete defense, or opting instead to disclose state secrets to mount a complete defense. Either course is improper, particularly where it is this Court, and not the district court, that now has jurisdiction over the threshold state secrets privilege issue. To the extent the district court contemplates that the merits may be determined in whole or in part through consideration of classified evidence, the Supreme Court has "expressly foreclosed" forcing the Government to litigate such matters even *in camera*, see *El-Masri v. United States*, ___ F.3d ___, 2007 WL 625130, at *11 (4th Cir. Mar. 2, 2007) (citing *United States v. Reynolds*, 345 U.S. 1, 10 (1953)), and this Court has made clear that the state secrets "privilege is absolute" when the Government shows that litigation would risk divulging state secrets. See *Kasza*, 133 F.3d at 1166. Proceeding in district court would thus vitiate the very protections that the state secrets privilege is intended to protect, and that the Government's appeal under § 1292(b)—accepted by this Court—seeks to vindicate.

In analogous contexts, this Court has held that the district court is "automatically divested of jurisdiction to proceed" when an interlocutory appeal is brought on qualified immunity or double jeopardy grounds, unless the court certifies that the appeal is "frivolous" or that the defendant has waived such protections. See *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992); see *Marks v. Clarke*, 102 F.3d 1012, 1017 n.8 (9th Cir. 1996). This automatic "divestiture rule takes on added significance" in those contexts because the protections at issue implicate a "'right not to be tried'" that "would be irreparably harmed if the trial court continued to proceed to trial prior to the disposition of the appeal." See *United States v. Claiborne*, 727 F.2d 842, 850 (9th Cir. 1984).

This reasoning assumes even greater force when applied to interlocutory appeals involving Government claims that state secrets require dismissal. Where, as here, this Court certifies an appeal under § 1292(b), both this Court and the district court have inherently concluded that the appeal is far from frivolous, instead presenting "substantial" questions requiring immediate appellate resolution. Moreover, the "state secrets doctrine finds [that] the greater public good" lies in "dismiss[ing]" litigation that would jeopardize disclosure of state secrets, see *Kasza*, 133 F.3d at 1167; allowing the district court to continue to adjudicate plaintiffs' claims is incompatible with the overwhelming public interest in pretermitting litigation putting sensitive national security information at risk. The point is all the more salient where the district court lacks jurisdiction to proceed because the very issue on appeal is whether the court has correctly determined that it may do so.

B. The Balance Of Hardships And The Public Interest Weigh Heavily In Favor Of Granting A Stay.

The district court's order would effectively negate this Court's acceptance of the Government's appeal under § 1292(b), and a stay should be granted for that reason alone. A stay is also warranted because proceeding on plaintiffs' summary judgment motion, as contemplated by the court's March 13 order, would necessarily risk disclosure of sensitive and highly classified information, while plaintiffs would incur no countervailing harm of any kind if a stay were granted.

1. Plaintiffs filed their motion for partial summary judgment on liability on October 30, 2006. The district court's March 13, 2007 order requires the Government to respond by April 12, 2007, and sets a hearing on the motion for May 3, 2007.

As noted above, the basis for the district court's September 7, 2006 ruling that is the subject of this appeal was that plaintiffs were inadvertently shown a classified document during the Treasury Department's process designating plaintiff Al-Haramain Islamic Foundation as a "Specially Designated Global Terrorist." The court ruled that the document remains classified and that the information in it remains secret, but that plaintiffs could seek to establish standing and their *prima facie* case based on their recollection of the document's contents. See 451 F. Supp. 2d at 1223, 1226, 1229. In their partial summary judgment motion on liability, plaintiffs have accepted the court's invitation and have filed declarations (now under seal) citing their purported recollection of the document in question.

This entire procedure is awry, and its legitimacy is one of the questions pending before this Court in this appeal. "Courts are not required to play with fire and chance further disclosure—inadvertent, mistaken, or even intentional—that would defeat the very purpose for which the privilege exists." *Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005). As noted, to respond to plaintiffs' motion, the

Government will now have to reassert the very privilege issues pending on appeal.

The decision that the court apparently contemplates issuing based on its May 3, 2007 hearing also carries an improper risk of disclosing state secrets. The purpose of the summary judgment proceedings is to determine if plaintiffs could establish standing and a *prima facie* case and, if so, to proceed to the merits of their claims. However, if the court ultimately decides that the case may proceed, such a decision would necessarily tend to confirm or deny a fact that remains very much in dispute and that the Government believes is properly privileged, *i.e.*, whether plaintiffs were actually subject to surveillance. Thus, whatever plaintiffs may recall of the classified document they have seen, and whatever they may argue to the court *in camera*, the process contemplated by the court would plainly not preserve crucial secrecy, given that any determination in plaintiffs' favor would be reflected on the public record and would necessarily implicate the very privilege point with respect to which the Government has sought, and this Court has granted, interlocutory review. Summary judgment proceedings would also implicate other issues on appeal, including whether the evidence needed to decide this case on the merits includes state secrets (as the Government contends), and, thus, whether dismissal was mandated at the outset.

2. While, for the above reasons, denial of a stay would impose real and serious harm on the Government and the public, granting a stay of the court's March 13 order would result in no countervailing harm to plaintiffs; indeed, granting a stay would cause plaintiffs no harm at all. At the outset, to the extent plaintiffs seek injunctive relief against the TSP, this lawsuit is no longer live, even assuming *arguendo* that plaintiffs had been subject to warrantless surveillance under the TSP (an issue subject to the privilege assertion). As discussed above, in light of orders issued by the Foreign Intelligence Surveillance Court on January 10, 2007, TSP surveillance is no longer authorized by the President or conducted by NSA, and any electronic surveillance that was occurring as part of the TSP is now being conducted subject to the approval of the Foreign Intelligence Surveillance Court. Thus, whether viewed in terms of standing or mootness, plaintiffs are unable to show any ongoing effects from the TSP, and plaintiffs cannot show that prospective relief would redress any ongoing injury. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) ("'[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive [or declaratory] relief'" (ellipses omitted)); *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006) (plaintiffs must "demonstrate that they are 'realistically threatened by a *repetition* of the [alleged] violation'").

In short, there is no argument that granting a stay of the district court's consideration of plaintiffs' summary judgment motion would somehow facilitate ongoing TSP surveillance. Nor would a stay forestall consideration of any live injunctive claim against the TSP; the TSP is no longer authorized, and any claim for prospective relief as to the TSP must therefore be dismissed for that reason alone.

Beyond this, plaintiffs allege that, in March and April of 2004, they were subject to unlawful electronic surveillance under the TSP, and on that basis they seek monetary relief. See Complaint ¶19; *id.*, Prayer for Relief. As detailed in the Government's public and classified district court briefs, to the extent plaintiffs have a viable damages claim (which the Government contests), litigating even this claim would implicate information encompassed by the state secrets privilege. Indeed, the crux of our application for interlocutory appeal—an application granted by this Court—is precisely that dismissal is required because plaintiffs cannot establish standing or prove their *prima facie* case, and the Government cannot seek to refute standing or defend on the merits, without disclosing privileged information. See Gov. Pet. at 12-20 (Tab 5). Staying the district court's consideration of plaintiffs' summary judgment motion, until these threshold and potentially dispositive state secrets questions are resolved by this Court in the pending appeal, would not prejudice plaintiffs in any way, and is the only course consistent with this Court's decision to accept the interlocutory appeal in the first place.[4]

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[4] To the extent plaintiffs also seek an order expunging information derived from any alleged TSP surveillance of them in the past, that claim also would not be prejudiced by staying the district court's order. Plaintiffs do not claim any imminent threat of harm from any alleged use of information obtained from what they allege is unlawful electronic surveillance of them under the TSP, and litigating their expunction claim would also implicate highly classified state secrets, even assuming a valid legal basis otherwise existed for such a claim.

We also ask this Court for an immediate, interim stay pending its consideration of this stay motion. For the above reasons, summary judgment proceedings in this case should not proceed in district court while the Government's threshold motion to dismiss is before this Court on interlocutory appeal, and those proceedings should be held in abeyance while this Court considers this stay motion.

CONCLUSION

For the foregoing reasons, the district court's order of March 13, 2007 should be stayed pending this 28 U.S.C. 1292(b) appeal. In addition, this Court should enter an immediate, interim stay of the order pending its consideration of this stay motion.

Respectfully submitted,

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MARCH 2007

CERTIFICATE OF SERVICE

I certify that on this 26th day of March, 2007, I dispatched the foregoing motion with attachments to the following by Federal Express and electronic mail:

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ATTACHMENTS

1. District Court Order, filed March 13, 2007.

2. Letter from Attorney General Gonzales to Senators Leahy and Specter, dated January 17, 2007.

3. Ninth Circuit Order Granting Abeyance Motion, filed Jan. 9, 2007

4. Ninth Circuit Order Granting Permission to Appeal under 28 U.S.C. 1292(b), filed Dec. 21, 2006

5. United States' Petition for Interlocutory Appeal under 28 U.S.C. 1292(b), filed Sept. 21, 2006 (Attachments Omitted).

6. District Court Order Denying Motion to Dismiss: *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. Sept. 7, 2006).

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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE:

NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION

MDL 06-1791 VRW

ORDER

This Document Relates To:

Al-Haramain Islamic Foundation, Inc, et al v Bush, et al, 07-109

_________________________________/

On October 30, 2006, plaintiffs in Al-Haramain Islamic Foundation, Inc, et al v Bush, et al, 07-109, moved for partial summary judgment while the suit was pending before Judge King in the District of Oregon. See Doc #85, 06-274-KI. On November 1, 2006, Judge King stayed responsive briefing on plaintiffs' motion pending action by the Judicial Panel on Multidistrict Litigation (JPML) in MDL-1791. Doc #91, 06-274-KI. The JPML has since transferred the case to this court. See Doc #1, 07-109.

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Accordingly, the court sets the following briefing schedule: defendants' opposition to plaintiffs' motion for partial summary judgment shall be filed on or before April 12, 2007, and plaintiffs' reply, if any, is due April 19, 2007. The court will hear argument on plaintiffs' motion on May 3, 2007, at 2:00 pm, or at such other time as they may arrange with the courtroom deputy, Ms Cora Klein, 415-522-2039.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge

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The Attorney General

Washington, D.C.

January 17, 2007

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Minority Member
Committee of the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Senator Specter:

I am writing to inform you that on January 10, 2007, a Judge of the Foreign Intelligence Surveillance Court issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. As a result of these orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court.

In the spring of 2005—well before the first press account disclosing the existence of the Terrorist Surveillance Program—the Administration began exploring options for seeking such FISA Court approval. Any court authorization had to ensure that the Intelligence Community would have the speed and agility necessary to protect the Nation from al Qaeda—the very speed and agility that was offered by the Terrorist Surveillance Program. These orders are innovative, they are complex, and it took considerable time and work for the Government to develop the approach that was proposed to the Court and for the Judge on the FISC to consider and approve these orders.

The President is committed to using all lawful tools to protect our Nation from the terrorist threat, including making maximum use of the authorities provided by FISA and taking full advantage of developments in the law. Although, as we have previously explained, the Terrorist Surveillance Program fully complies with the law, the orders the Government has obtained will allow the necessary speed and agility while providing substantial advantages. Accordingly, under these circumstances, the President has determined not to reauthorize the Terrorist Surveillance Program when the current authorization expires.

The Intelligence Committees have been briefed on the highly classified details of these orders. In addition, I have directed Steve Bradbury, Acting Assistant Attorney General for the Office of Legal Counsel, and Ken Wainstein, Assistant Attorney General for National Security, to provide a classified briefing to you on the details of these orders.

Sincerely,

Alberto R. Gonzales
Attorney General

cc: The Honorable John D. Rockefeller, IV
The Honorable Christopher Bond
The Honorable Sylvester Reyes
The Honorable Peter Hoekstra
The Honorable John Conyers, Jr.
The Honorable Lamar S. Smith

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 09 2007

CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

AL-HARAMAIN ISLAMIC FOUNDATION, INC., an Oregon Nonprofit Corporation; et al., Plaintiffs - Appellees, v. GEORGE W. BUSH, President of the United States, Defendant - Appellant.	No. 06-36083 D.C. No. CV-06-00274-GMK District of Oregon, Portland ORDER

Appellant's motion to hold this appeal in abeyance initially filed in No. 06-80134, pending resolution by this court of *Hepting v. AT&T Corp.*, No. 06-17132, and *Hepting v. United States*, appeal 06-17137, is granted.

The briefing schedule is stayed pending further order of the court.

For the Court

Lisa Calero
Motions Attorney/Deputy Clerk
9th Cir. R. 27-7
General Orders/Appendix A

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 21 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

AL-HARAMAIN ISLAMIC FOUNDATION, INC., et al., Plaintiffs - Respondents, v. GEORGE W. BUSH, President of the Unites States; et al., Defendants - Petitioners.	No. 06-80134 D.C. No. CV-06-00274-KI District of Oregon, Portland ORDER

Before: McKEOWN and FISHER, Circuit Judges.

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Within 10 days of this order, petitioners shall perfect the appeal pursuant to Federal Rule of Appellate Procedure 5(d). *See also* 9th Cir. R. 3.1(c). The Clerk is directed to open a new docket number for this appeal.

Petitioners' alternate motion to hold this appeal in abeyance pending resolution by this court of *Hepting v. AT&T Corp.*, appeal No. 06-17132, and *Hepting v. United States*, appeal No. 06-17137, shall be addressed by separate order.

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FILED
SEP 21 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AL-HARAMAIN ISLAMIC FOUNDATION, INC., *et al.*,	)	
Plaintiffs/Respondents,	)	
v.	)	**No. 06-80134 (9th Cir.)**
GEORGE W. BUSH, President of the United States, *et al.*,	)	**D. Ct. Civ. No. 06-274-KI (D. Or.)**
Defendants/Petitioners.	)	

PETITION BY DEFENDANTS FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)

PETER D. KEISLER
Assistant Attorney General

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202-514-3602

INTRODUCTION AND SUMMARY

Defendants hereby petition this Court for permission to appeal the district court's September 7, 2006 order denying the Government's motion to dismiss. Recognizing the importance and controversial nature of its order, the district court *sua sponte* certified the order for an immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

As described below, this case warrants interlocutory appeal because the district court has denied the Government's motion to dismiss this case on state secrets grounds, and thereby placed at risk particularly sensitive national security interests. The district court has further erred by allowing this litigation to move to the next phase in which the plaintiffs will in sealed filings attempt to demonstrate standing, even though we have shown that, because of the state secrets privilege, standing cannot be established and the case cannot proceed to judgment. Under such circumstances, dismissal is plainly appropriate. Rather than apply the state secrets privilege as precedent requires, the district court is wrongly attempting to create some form of secret adversarial proceedings, and, in doing so, is raising a serious danger of disclosure of important national security information.

District Judge Walker and all parties in *Hepting v. AT&T*, Nos. 06-80109, 06-80110 (9th Cir.), which also concerns the Terrorist Surveillance Program and many of the same questions presented here, recognized that these issues warranted immediate appeal under § 1292(b). The Government filed its § 1292(b) petition in *Hepting* nearly two months ago, the *Hepting* plaintiffs' response consented to our request for immediate review, and both the Government and the plaintiffs have requested expedited briefing and argument in *Hepting*. This Court will presumably act upon the *Hepting* petition before deciding the petition here since the appellate proceedings in *Hepting* are at a more advanced stage. Accordingly, because the key issues in our petition in *Hepting* substantially overlap the issues here, it would serve the interests of judicial economy for the Court to hold this petition while the Court resolves the issues raised in *Hepting*, which may govern this matter or, at the very minimum, be highly relevant to the disposition of this petition.

The plaintiffs in this suit are the Al-Haramain Islamic Foundation – an organization designated as a global terrorist by the Secretary of the Treasury under an Executive Order program designed to identify and interrupt the activities of entities providing financial support and services for international terrorists – and two attorneys who allege "business and other relationships" with Al-Haramain. Plaintiffs claim that defendants violated various constitutional and statutory provisions by allegedly intercepting plaintiffs' communications under the Terrorist Surveillance Program, which was implemented by the National Security Agency (NSA) at the direction of the President. The Government asserted the state secrets privilege, and moved to dismiss because this case cannot proceed without forcing revelation of highly confidential national security information.

Despite supporting declarations filed by the Director of National Intelligence and the Director of the NSA, the district court rejected the Government's motion to dismiss based on the officials' assertion of the state secrets privilege. While concluding that whether the plaintiffs were in fact subject to surveillance properly remains a state secret, the district court ruled that the subject matter of this action was no longer a secret as applied to plaintiffs under their theory of the case, because they claim to have viewed a highly classified Government document that allegedly shows that they were subject to such surveillance. The court accordingly denied the Government's motion to dismiss, initiated a discovery conference, and ruled that the plaintiffs may file *in camera* affidavits based on their recollection of the classified contents of the document in order to establish the factual foundation for their standing. Recognizing the importance and controversial nature of its ruling, the district court *sua sponte* certified its denial of the Government's motion to dismiss for interlocutory appeal.

The district court was clearly correct in certifying this matter for appeal. By denying the Government's motion to dismiss, the court directly contradicted the judgment of the Director of National Intelligence and the head of the NSA on a national security matter. Moreover, the court has done so in a case in which, because of the contours of the state secrets privilege as applied to this case, this litigation cannot proceed to judgment. Any further steps would be futile, while creating a serious risk that sensitive classified information would be disclosed.

QUESTION PRESENTED FOR APPEAL

Whether the district court erred in denying the Government's motion to dismiss based on the assertion of the state secrets privilege by the Director of National Intelligence.

BACKGROUND

1. After various media stories appeared concerning asserted post-9/11 foreign intelligence activities carried out by the NSA, plaintiffs filed this action in the District of Oregon against the President, the NSA, and other federal agencies and officials. Plaintiffs allege that they were subject to electronic surveillance under the Terrorist Surveillance Program, and that such surveillance violated various constitutional provisions. Plaintiffs additionally contend that the alleged surveillance violated the Foreign Intelligence Surveillance Act and the International Convention for the Suppression of the Financing of Terrorism.

Plaintiffs' allegations arose in part from the President's December 2005 public revelation of the Terrorist Surveillance Program. The President explained that he had assigned the NSA to intercept international communications of persons with known links to al Qaeda and related terrorist organizations. See D. Ct. Op. at 11. The

President took this step pursuant to his Commander-in-Chief powers, as well as under the Authorization for Use of Military Force, passed by Congress shortly after 9/11, giving the President authority to use all necessary and appropriate force against those responsible for 9/11, and to prevent further attacks in the future. See Pub. L. No. 107-40, 115 Stat. 224 (2001).

The Attorney General subsequently confirmed publicly that, under the Terrorist Surveillance Program, the NSA intercepts the contents of foreign communications to and from the United States when the Government has a reasonable basis to conclude that one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. D. Ct. Op. at. 12.

2. The Government asserted the state secrets privilege, as well as statutory privileges covering the NSA, and moved for dismissal or summary judgment. We argued that the case could not be litigated in light of the state secrets assertion. The invocation of that privilege was supported by public and classified declarations from the Director of National Intelligence and the NSA Director. At our suggestion, the district judge reviewed the classified *ex parte/in camera* declarations from both of these officials, which explained the privilege assertions. D. Ct. Op. at 7.

We filed both public and *ex parte/in camera* briefs in support of our motion to dismiss, arguing that the state secrets privilege had been properly asserted, and that litigation over plaintiffs' claims threatened disclosure of important intelligence information, sources, and methods. We further asserted that dismissal of the complaint was required because the subject matter of the case is a state secret, that state secrets are necessary for plaintiffs to litigate their claims (including their ability to establish their standing), and that the Government could not defend itself without disclosure of state secrets. In so arguing, we made clear that the Government could neither confirm nor deny whether plaintiffs were subject to the foreign intelligence gathering activities alleged in the complaint. We contended that these arguments covered both plaintiffs' statutory and constitutional claims. Finally, we showed that adjudication of whether the surveillance alleged by plaintiffs had been conducted lawfully would require disclosure of state secrets as well.

3. By order of September 7, 2006 (a copy of which is attached to this petition), the district court denied our motion to dismiss. (The opinion is published at 2006 WL 2583425.) Critical to the court's ruling is its conclusion that the very subject matter of this litigation is not a secret to plaintiffs because plaintiffs have reviewed a classified document that they claim shows that they were subject to surveillance under the Terrorist Surveillance Program. D. Ct. Op. at 15-19. The court did so by concluding – erroneously – that the plaintiffs could proffer evidence regarding their recollection of the contents of the classified document in order to prove their standing to sue and the merits of a *prima facie* case.

The district court initially concluded that the unauthorized release of a highly classified Government document to plaintiffs "did not waive [the] state secrets privilege" or declassify the content of the document, which the court recognized "remains secret." *Id.* at 14, 24. The court thus found that "whether plaintiffs were subject to surveillance" is a factual matter that "remains secret." *Id.* at 14.

However, the district court reasoned that "it is not a secret to plaintiffs whether [or not] their communications have been intercepted" if one accepts plaintiffs' contention that the classified document they reviewed shows that such surveillance of plaintiffs has occurred. *Id.* at 13-14. Because the plaintiffs "know what information the Sealed Document contains," the court reasoned, "no harm to the national security would occur if plaintiffs are able to prove the general point that they were subject to surveillance as revealed in the Sealed Document." *Id.* at 13, 16.

In rejecting the determinations of the Director of National Intelligence and Director of the NSA that further litigation on this issue could cause grave harm to national security, the district court focused on its view that further proceedings would not further harm national security because the plaintiffs themselves have already reviewed the contents of the classified document. *Id.* at 15-16. The court did so without addressing the determination by the head of the intelligence community and the NSA that an official Government (or court) confirmation or denial of such surveillance to the *public at large* would harm national security. The district court nevertheless ruled that there would be "no reasonable danger that the national security would be harmed if it is confirmed or denied that plaintiffs were subject to surveillance" to the extent that a "surveillance event or events [are] disclosed in the Sealed Document." *Id.* at 17.

This determination led the court to conclude that the "very subject matter of this litigation" – that is, whether the NSA conducted surveillance of plaintiffs under the Terrorist Surveillance Program – is not a state secret that would require dismissal if plaintiffs can prove that "the Sealed Document demonstrates that they were under surveillance." *Id.* at 17-19. The court further ruled that "plaintiffs should have an opportunity to establish standing and make a *prima facie* case" by submitting *in camera* affidavits "attesting to the contents of the document from their memories." *Id.* at 21, 25-26. The district court accordingly denied the Government's motion to dismiss, and directed the parties to proceed to the discovery phase of this case. *Id.* at 32. In so ruling, the court declined to decide whether it would be futile to conduct further proceedings because, as the Government argued, the state secrets assertion not only precludes use of evidence needed by plaintiffs to establish standing and make a *prima facie* case, but also precludes the use of evidence needed by the Government to defend this case. D. Ct. Op. at 20-22.

At the end of its opinion, the district court *sua sponte* certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). *Ibid.* The court explained that it "recognized, as did Judge Walker in *Hepting*," that its decision involved "'a controlling question of law' about which there is 'substantial ground for difference of opinion,'" and that interlocutory appeal was warranted because such an appeal "'may materially advance the ultimate termination of this litigation.'" *Ibid.*

REASONS FOR GRANTING PERMISSION TO APPEAL

Interlocutory appeal by the United States pursuant to Section 1292(b) is warranted when the Court finds "that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

The district court rightly determined that the standards for Section 1292(b) have been met here. The issues in this case are of undeniable importance and great public interest. They involve the question of whether the assertion by the Director of National Intelligence of the state secrets privilege required dismissal because the very subject matter of this action involves a state secret (namely, whether plaintiffs were subject to surveillance under the Terrorism Surveillance Program), and because this case cannot be litigated to judgment in any event.

A. The State Secrets Privilege and its Effect on this Litigation.

The ability of the Executive to protect military or state secrets from disclosure has been recognized from the earliest days of the Republic. See *Totten v. United*

States, 92 U.S. 105 (1875); *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807); *United States v. Reynolds,* 345 U.S. 1, 6-7 (1953). The state secrets privilege derives from the President's Article II powers to conduct foreign affairs and provide for the national defense. *United States v. Nixon*, 418 U.S. 683, 710 (1974). For the privilege to apply, "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by the officer." *Reynolds*, 345 U.S. at 7-8.

The privilege protects a broad range of state secrets, including information that would result in "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign Governments." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984).

Significantly for this case, this Court has made clear that the state secrets privilege protects information that may appear innocuous on its face, but which in a larger context could reveal sensitive classified information. *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir.), *cert denied*, 525 U.S. 967 (1998).

> It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.

Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978) (*Halkin I*). "Accordingly, if seemingly innocuous information is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure and the court cannot order the Government to disentangle this information from other classified information." *Kasza*, 133 F.3d at 1166.

This Court has emphasized that an assertion of the state secrets privilege "must be accorded the 'utmost deference' and the court's review of the claim of privilege is narrow." *Kasza*, 133 F.3d at 1166. Aside from ensuring that the privilege has been properly invoked as a procedural matter, the sole determination for the reviewing court is whether, "under the particular circumstances of the case, 'there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.'" *Id.* at 1166 (quoting *Reynolds*, 345 U.S. at 10).

Thus, in assessing whether to uphold a claim of privilege, the court does not balance the respective needs of the parties for the information. Rather, "[o]nce the privilege is properly invoked and the court is satisfied that there is a reasonable danger that national security would be harmed by the disclosure of state secrets, the privilege is absolute[.]" *Kasza*, 133 F.3d at 1166. Further, "the Government need not demonstrate that injury to the national interest will inevitably result from disclosure." *Ellsberg*, 709 F.2d at 58.

The state secrets privilege does not simply require that sensitive information be removed from a case; if, as here, "the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege." *Kasza*, 133 F.3d at 1166 (citing *Reynolds,* 345 U.S. at 11 n. 26).

B. The District Court Improperly Overrode the Government's Assertion of the State Secrets Privilege With Regard to Plaintiffs' Allegation that They Were Subject to Surveillance.

As noted above, we submitted to the district court public and classified declarations from the Director of National Intelligence and the NSA Director. Based on those declarations, we showed that adjudicating each of plaintiffs' claims would, among other things, require confirmation or denial of whether plaintiffs have been the targets of alleged intelligence activities. The declarations made clear that such information cannot be confirmed or denied *to the public* without causing exceptionally grave damage to national security. Because the most basic factual allegation necessary for plaintiffs' case – whether they have been subjected to surveillance under the Terrorist Surveillance Program – can neither be officially confirmed nor denied by either the Government or a court decision adjudicating plaintiffs' claims, the very subject matter of this litigation is a state secret.

Indeed, every step in this case – for plaintiffs to demonstrate their standing by showing that they were subject to surveillance, for plaintiffs to prove their claim that such surveillance was unlawful, or for the Government to defend against such contentions – would immediately require privileged information. And any judicial resolution of these issues would necessarily reveal publicly the basic fact or non-fact of the alleged surveillance that is the very subject matter of this action. As a result, it would vitiate the privilege to permit this action to proceed further.

Much of the district court's decision confirms that dismissal was warranted. The court correctly ruled that both the Government document upon which plaintiffs rely and the highly classified contents of that document remain protected by the Government's invocation of the state secrets privilege. D. Ct. Op. at 14, 24; see also *id.* at 26 (ordering plaintiffs to return "all copies" of the document). It likewise correctly held that, "whether the plaintiffs were subject to surveillance" remains secret, "even if," as the plaintiffs claim, "plaintiffs know they were" subject to such surveillance. *Id.* at 14.

However, the district court seriously erred by overstepping its proper role concerning review of the National Intelligence Director's claim of state secrets privilege. Without addressing the Director's conclusion that national security would be harmed with any *public* confirmation or denial of the fact of plaintiffs' alleged surveillance, the court ruled that the "very subject matter of this case" is "not a state secret" as to these particular plaintiffs if, as plaintiffs claim, they can prove that the classified document "demonstrates that they were under surveillance." *Id.* at 19. In addition, the court took the highly unusual step of concluding that plaintiffs should be afforded the opportunity to prove their case with *in camera* evidence based on their "memory" of the classified "contents of the document." *Id.* at 25.

This conclusion is plainly inconsistent with the approach taken by the Supreme Court and other courts in similar contexts. The Supreme Court recently reaffirmed that, "'where the very subject matter of the action'" is "'a matter of state secret,'" the action should be dismissed at the pleading stage because, in such circumstances, it is "'obvious that the action should never prevail over the privilege.'" *Tenet v. Doe*, 544 U.S. 1, 9 (2005) (quoting discussion of *Totten* rule in *Reynolds*, 345 U.S. at 11 n.26). Indeed, the Court made clear that the "use of *in camera* judicial proceedings simply cannot provide the absolute protection [it] found necessary in enunciating the *Totten* rule" for cases where the very subject matter of the action is a state secret. *Id.* at 11. The risk of revealing the state secrets at the heart of the case – a risk inherent in conducting further judicial proceedings, even proceedings where precautions are taken to protect secrets from disclosure – is "unacceptable" as a matter of public policy. *Ibid.*

That logic directly applies here. The district court recognized that the key question whether plaintiffs were subject to surveillance under the Terrorist Surveillance Program remains a state secret, yet the court declined to dismiss the case and, instead, contemplated further proceedings in which plaintiffs will submit *in* *camera* declarations to attempt to establish factually their allegations regarding that state secret. This approach is plainly inconsistent with the Supreme Court's decisions in *Totten* and *Tenet*, where the plaintiffs undoubtedly knew of and could have testified from personal knowledge regarding their claim to have entered into espionage agreements with the United States. Both cases were dismissed notwithstanding such personal knowledge concerning a state secret. Moreover, the classified document upon which plaintiffs base their case here cannot be used as an evidentiary foundation. Even though the district court has authority to review the document, the document and its contents are, as the district court found, properly classified state secrets protected by the Government's privilege.

At every step in this case, the fundamental and key factual issue is a state secret: whether plaintiffs were subject to surveillance through the Terrorist Surveillance Program. Litigation under the district court's erroneous ruling permits plaintiffs to submit evidence concerning highly classified matters; forces the Government to defend itself by addressing the substance of plaintiffs' allegations regarding classified information; and, ultimately, may permit the district court to rule on claims premised upon a state secret. Any ruling on standing, the plaintiffs' prima facie case, or a final judgment would very likely confirm or deny whether plaintiffs were subject to surveillance, a fact that even the district court concludes is a state secret (except as to plaintiffs). In fact, if plaintiffs were surveilled as they allege and the district court were to rule for plaintiffs, such a ruling would necessarily confirm the existence of foreign intelligence activities concerning plaintiffs, and cause grave harm to national security. In short, the very subject matter of this action is a state secret requiring dismissal.

Further, the district court's order appears to contemplate that this case might be litigated between the parties in secret. Such a proceeding in these circumstances would be extraordinary and inconsistent with state secrets privilege precedent. In analogous circumstances, other cases have been dismissed in light of state secrets privilege claims. In *Halkin I*, for example, individuals and organizations alleged that they were subject to unlawful surveillance by the NSA and the CIA due to their opposition to the Vietnam War. See 598 F.2d at 3. The D.C. Circuit upheld an assertion of the state secrets privilege, concluding that the "mere fact of interception" was a state secret that would warrant dismissal even though there were significant public disclosures about the surveillance activities at issue. *Id.* at 8, 10.

In *Halkin II*, the D.C. Circuit further held that the plaintiffs were incapable of demonstrating their standing to challenge the alleged surveillance, ruling that the fact of such surveillance could not be proven even if the plaintiffs could establish (with evidence not covered by the Government's state secrets assertion) that the CIA had requested the NSA to intercept plaintiffs' communications by including their names on a "watchlist" sent to the NSA. See *Halkin v. Helms*, 690 F.2d 977, 991, 997, 999-1001 (D.C. Cir. 1982) (*Halkin II*).[1]

Similarly, in *Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir. 1983), a group of individuals filed suit after learning during the course of the "Pentagon Papers" criminal proceedings that one or more of them had been subject to warrantless electronic surveillance. Although two such wiretaps were admitted, the Attorney General asserted the state secrets privilege, refusing to disclose to the plaintiffs whether any other such surveillance occurred. See *id.* at 53–54. As a result of the privilege assertion, the D.C. Circuit upheld the district court's dismissal of the claims brought by the plaintiffs that the Government had not admitted surveilling, because those plaintiffs could not prove actual injury. See *id.* at 65.

The same result was required here. Moreover, interlocutory appeal is necessary so that, before the confidentiality of highly sensitive foreign intelligence gathering information is placed at further risk, this Court has an opportunity to consider the validity of the Government's invocation of the state secrets privilege. As the Fourth Circuit has observed in upholding dismissal of a case in light of the state secrets privilege: "Courts are not required to play with fire and chance further disclosure

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[1] Because the CIA conceded that nine plaintiffs had been subjected to certain types of non-NSA surveillance, the D.C. Circuit held that those plaintiffs had demonstrated an injury-in-fact. See *Halkin II*, 690 F.2d at 1003.

–inadvertent, mistaken, or even intentional – that would defeat the very purpose for which the privilege exists." *Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1052 (2006).

C. This Court Should Defer Action on this Petition Until It Enters a Final Order in *Hepting v. AT&T*, Nos. 06-80109, 06-80110 (9th Cir.).

As we have explained, interlocutory appeal is plainly appropriate here. However, this Court already has before it the Government's unopposed petition for interlocutory appeal in *Hepting v. AT&T*, which involves state secret issues that substantially overlap those presented here. The *Hepting* parties have agreed to expedited briefing and argument, and, as we explain below, the Court's resolution of the issues in *Hepting* may govern or, at a minimum, significantly impact the state secrets issues in this petition. The Court therefore should hold the present petition pending a final ruling in *Hepting*, and then dispose of this case on an expedited basis.

In *Hepting*, the plaintiffs filed suit against AT&T and others, alleging, among other things, that AT&T unlawfully collaborated with the NSA by intercepting and disclosing the plaintiffs' international communications to the NSA under the Terrorist Surveillance Program. The United States intervened, asserted the state secrets privilege, and moved to dismiss the action. The *Hepting* district court, like the district court here, denied that motion and allowed the case to proceed to limited discovery on the ground that "'the very subject matter of the action'" was not a state secret requiring dismissal. See *Hepting v. AT&T*, 439 F. Supp. 2d 974, 993-94 (N.D. Cal. 2006). In so doing, the court, erroneously in our view, declined to credit the contrary public and *ex parte/in camera* declarations of the Director of National Intelligence, ruling instead that it was not a state secret whether AT&T assisted the NSA under the Terrorist Surveillance Program. See *ibid.*

The state secrets issues already presented in our unopposed petition in *Hepting* largely parallel the issues presented here. Both petitions turn on the proper application of the principle that dismissal is required when the very subject matter of a court action is a state secret. Both likewise concern the proper approach that a court must follow in evaluating the determination of the head of the intelligence community that a suit involves highly sensitive foreign intelligence information whose disclosure in litigation would cause grave harm to national security. Accordingly, the interests of judicial economy would be furthered by holding this petition pending the Court's disposition in *Hepting*.

CONCLUSION

For the foregoing reasons, as the district court itself recognized, the standards for an appeal under Section 1292(b) are fully satisfied here. The district court's order certainly involves controlling questions of law; if our arguments are accepted on appeal, such a ruling will materially advance the ultimate termination of the litigation because dismissal will be required. As described above, the United States moved to dismiss this case because the state secrets privilege prevents the litigation from going forward. The district court itself recognized that there is a substantial ground for difference of opinion on its state secrets ruling. However, because the petition in *Hepting* raises state secrets issues that substantially overlap with the issues here, we request that the Court hold this petition until it enters a final order in *Hepting*.

Respectfully submitted,

PETER KEISLER
Assistant Attorney General

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September 20, 2006

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purposes, and has discretion as to when and where it will undertake the inventory.

[13] The same claim was made in *Center for Biological Diversity v. BLM, supra.* There the court noted that "directives in management plans, such as directives to monitor and study species, are not legally enforceable." 2006 WL 662735 *46 (citing *Norton v. Southern Utah Wilderness Alliance,* 542 U.S. 55, 69–70, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004)). The court, as noted, concluded that the problem was not the failure to conduct the inventory of a species as required by FLPMA, but the failure to have sufficient current information on a species to make a reasoned decision regarding environmental impacts. That rationale applies equally here. As part of its obligation under NEPA to conduct an environmental assessment of the impacts of the East–West Gulch Projects, BLM needed current and accurate information on wilderness values. The court has found BLM did not have such information. As a consequence, the final decision to implement the East–West Gulch Projects was arbitrary and capricious. ONDA's right of action against BLM arising from that failure stems from NEPA, not FLPMA.

Accordingly, the court concludes BLM is entitled to summary judgment on ONDA's FLPMA claim.

CONCLUSION

Based on the foregoing, the court **DENIES** BLM's motion to strike (doc. # 43), **DENIES** ONDA's motion to strike (doc. # 65), recommends that ONDA's motion for summary judgment (doc. # 23) be **GRANTED in part** and **DENIED in part**, and recommends that BLM's cross-motion for summary judgment (doc. # 38) be **GRANTED in part** and **DENIED in part**.

SCHEDULING ORDER

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due May 15, 2006. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date. If objections are filed, a response to the objections is due fourteen days after the date the objections are filed and the review of the Findings and Recommendation will go under advisement on that date.

IT IS SO ORDERED.

AL–HARAMAIN ISLAMIC FOUNDATION, INC., an Oregon Nonprofit Corporation, Wendell Belew, a U.S. Citizen and Attorney at Law, Asim Ghafoor, a U.S. Citizen and Attorney at Law, Plaintiffs,

v.

George W. BUSH, President of the United States, National Security Agency, Keith B. Alexander, its Director, Office of Foreign Assets Control, an office of the United States Treasury, Robert W. Werner, its Director, Federal Bureau of Investigation, Robert S. Mueller, III, its Director, Defendants,

and

Oregon Publishing Company, Intervenor.

No. 06–274–KI.

United States District Court,
D. Oregon.

Sept. 7, 2006.

Background: Islamic foundation, a director and its attorneys sued government, claiming that telephone conversations were monitored in violation of Foreign Intelligence Surveillance Act (FISA). Claimants filed motion to compel discovery, and government filed motion to dismiss and motion to prevent access to sealed classified document, on grounds that content of document was state secret.

Holdings: The District Court, King, J., held that:

(1) claimants showed strong need for document, which allegedly showed that government had undertaken surveillance in question;

(2) fact that government maintained surveillance program was not secret;

(3) there would be no harm to national security, to extent that it was disclosed that claimants were subjected to surveillance; and

(4) broader concerns over national security precluded access to document.

Ordered accordingly.

1. Witnesses ⚷216(1)

State secrets privilege, under which government may deny discovery of military and state secrets, is absolute, provided government properly invokes privilege and court has determined that there is reasonable danger national security would be harmed by disclosure of material in question.

2. Witnesses ⚷216(1)

State secrets privilege may require dismissal of case (1) if specific evidence must be removed from the case as privileged, and plaintiff can no longer prove the prima facie elements of the claim without that evidence, (2) if the defendant is unable to assert a valid defense without evidence covered by the privilege, or (3) even if the plaintiff is able to produce nonprivileged evidence, the very subject matter of the action is a state secret.

3. Witnesses ⚷216(1)

Fact that government maintained surveillance program, involving warrantless wiretapping of telephone conversations where one party was located outside of United States, was not secret for purpose of asserting state secrets privilege as defense to request, by Islamic foundation, a director and its counsel, suing government for violation of Foreign Intelligence Surveillance Act (FISA), that records of wiretapped telephone conversations between foundation and attorneys be released. Foreign Intelligence Surveillance Act of 1978, §§ 101–111, 50 U.S.C.A. §§ 1801–1811.

4. Records ⚷32

There would be no harm to national security, as required for state secret privilege to bar disclosure of requested information contained in sealed document, requested by Islamic foundation, its director and their attorneys, suing government for conducting warrantless wiretapping in violation of Foreign Intelligence Surveillance Act (FISA), to extent that disclosure would simply confirm publicly known fact that claimants were subjected to surveillance, and would not release additional information regarding surveillance. Foreign Intelligence Surveillance Act of 1978, §§ 101–111, 50 U.S.C.A. §§ 1801–1811.

5. Records ⚷32

State secrets privilege could not be applied in suit alleging that Islamic foundation, its director and attorneys were subjected to surveillance that was illegal under Foreign Intelligence Surveillance Act (FISA), on grounds that entire suit turned on sealed document that would allegedly reveal that government conducted warrantless wiretapping of claimants' telephone conversations; government had acknowledged warrantless wiretapping, which was subject matter of case. Foreign Intelligence Surveillance Act of 1978, §§ 101–111, 50 U.S.C.A. §§ 1801–1811.

6. Records ⚷32

Concern over national security precluded grant of access to entire sealed document, allegedly showing that government intercepted telephone conversations involving Islamic foundation, its director and attorneys, in violation of Foreign Intelligence Surveillance Act (FISA), subject to right of claimants to submit affidavits in camera supporting their right to make prima facie case, following which court would consider release of documents with redactions. Foreign Intelligence Surveillance Act of 1978, §§ 101–111, 50 U.S.C.A. §§ 1801–1811.

7. Witnesses ⚷184(2)

The relevant inquiry in deciding whether a statute preempts a federal common law privilege is whether the statute speaks directly to the question otherwise answered by federal common law.

8. Records ⚷32

Court would not unseal document, allegedly showing monitoring of telephone conversations between Islamic foundation, its director and lawyers, allegedly showing violation of Foreign Intelligence Surveillance Act (FISA), even though document had at one point been inadvertently released. Foreign Intelligence Surveillance Act of 1978, §§ 101–111, 50 U.S.C.A. §§ 1801–1811.

Jon B. Eisenberg, Attorney at Law, Oakland, CA, Lisa R. Jaskol, Attorney at Law, Encino, CA, Thomas H. Nelson, Zaha S. Hassan, Thomas H. Nelson & Associates, Jessica Ashlee Albies, Law Office of J. Ashlee Albies, Steven Goldberg, Portland, OR, for Plaintiffs.

Andrea Marie Gacki, Andrew H. Tannenbaum, Anthony J. Coppolino, U.S. Department of Justice, Washington, D.C., for Defendants.

Charles F. Hinkle, Emilie K. Edling, Stoel Rives, LLP, Portland, OR, for Intervenor.

OPINION AND ORDER

KING, District Judge.

Plaintiffs Al–Haramain Islamic Foundation, Inc., Wendell Belew, and Asim Ghafoor filed suit against George W. Bush, the National Security Agency ("NSA"), the Office of Foreign Assets Control ("OFAC"), the Federal Bureau of Investigation ("FBI"), and the respective agency directors (collectively, "the government") for violations of the Foreign Intelligence Surveillance Act ("FISA"), the Separation of Powers clause, the Fourth, First and Sixth Amendments to the United States Constitution, and the International Convention for the Suppression of the Financing of Terrorism. The government has filed a Motion to Dismiss or, in the Alternative, for Summary Judgment (# 58) and a Motion to Prevent Plaintiffs' Access to the Sealed Classified Document (# 39). Plaintiffs have filed a Motion for Order Compelling Discovery (# 35). Oregonian Publishing Company has filed a Motion to Intervene and to Unseal Records (# 7).

For the reasons described herein, the government's Motion to Dismiss is denied, and its Motion for Summary Judgment is denied with leave to renew. The government's Motion to Prevent Plaintiffs' Access to the Sealed Classified Document is granted. Plaintiffs' Motion for Order Compelling Discovery is denied with leave to renew. Oregonian Publishing Company's Motion to Intervene was previously granted on April 25, 2006, and its Motion to Unseal Records is denied.

BACKGROUND

I. *Factual Background*

On December 17, 2005, in a radio address, and in response to an article the day before in *The New York Times,* President George W. Bush announced that he had authorized "the interception of international communications of people with known links to al Qaeda and related terrorist organizations" ("Surveillance Program") after the September 11, 2001 attacks.[1] President's Radio Address (Dec. 17, 2005), *available at* http://www.whitehouse.gov// news/releases/2005/12/20051217.html. Attorney General Alberto Gonzalez subsequently confirmed that the Surveillance Program intercepts communications where one party to the communication is outside the United States and the government has a reasonable basis to believe that at least one party to the communication is affiliated with, or working in support of, al Qaeda.

Plaintiffs allege in their Complaint that in February 2004 OFAC froze Al–Haramain's assets while investigating whether Al–Haramain was engaged in terrorist activities. At that time, Al–Haramain was affiliated with and supported by Al–Haramain Islamic Foundation, a charity in Saudi Arabia. Plaintiffs allege that Al–Haramain's assets were frozen as a result of warrantless electronic surveillance between a director or directors of Al–Haramain and its attorneys, Belew and Ghafoor. Plaintiffs also allege that in March and April 2004 the NSA engaged in electronic surveillance of communications between Al–Haramain's director or directors and Belew and Ghafoor, without obtaining a court order or otherwise following the procedures required under FISA. They further allege that in May 2004, the NSA turned over logs of these conversations to OFAC, which subsequently identified Al–Haramain as a "specially designated global terrorist" in September 2004.

The government offers some additional information about Al–Haramain. It explains that the identification of Al–Haramain as a specially designated global terrorist was due to its having provided support to al Qaeda, Osama bin Laden, and other specially designated global terrorists. In addition, the United Nations Security Council has identified Al–Haramain as an entity belonging to or associated with al Qaeda. The government also explains that Soliman Al–Buthi,[2] a director of Al–Haramain and a citizen of Saudi Arabia, has been identified as a specially designated global terrorist.

Plaintiffs seek a declaration that the surveillance of them was unlawful, seek disclosure of the communications, information, and records obtained as a result of the surveillance, along with the subsequent destruction of such information and records, seek to enjoin warrantless surveillance of plaintiffs, seek $1,000 or $100 per day for each violation of FISA, and seek punitive damages of $1,000,000, costs and attorney fees.

Along with their Complaint, plaintiffs filed a document under seal with the Court (the "Sealed Document"). OFAC inadvertently disclosed this document to counsel for Al–Haramain in late August 2004 as part of a production of unclassified documents relating to Al–Haramain's potential status as a specially designated global terrorist.

1. The government refers to the program as the "Terrorist Surveillance Program" or "TSP" in its briefing, while plaintiffs refer to the program as the "warrantless surveillance program."

2. The government spells this individual's name as Al'Buthe, but I will employ plaintiffs' spelling.

Lynne Bernabei, an attorney for Al–Haramain and for two of its directors, Al–Buthi and Pirouz Sedaghaty (a k a Pete Seda), testified in a declaration about the circumstances surrounding her dissemination of the Sealed Document. Upon receiving the packet of materials from OFAC, she copied and disseminated the materials, including the pertinent document which was labeled "TOP SECRET," to Al–Haramain's directors and Bernabei's co-counsel. In August or September, a reporter from the Washington Post reviewed these documents for an article he was researching. On October 7, 2004, Bernabei learned from the FBI that included among the produced documents was a sensitive document that OFAC claimed had been inadvertently released. At the request of the FBI, Bernabei and her co-counsel returned their copies of the sensitive document to the FBI. The FBI did not pursue Al–Haramain's directors, whom the government describes as "likely recipients" of the document, to ask them to return their copies.

The government asserts that the Sealed Document carries a classification of "TOP SECRET" and that it contains "sensitive compartmented information" or "SCI." The Sealed Document is now in the Secure Compartmentalized Information Facility at the FBI office in Portland ("SCIF").

II. *Procedural Background*

On March 17, 2006, the Oregonian Publishing Company filed a Motion to Intervene and to Unseal Records. On May 22, 2006, plaintiffs filed a Motion for Order Compelling Discovery, seeking to compel the government to respond to interrogatories requesting information about electronic surveillance of the plaintiffs and information regarding the reasons for classifying the Sealed Document. On May 26, 2006, the government filed a Motion to Prevent Plaintiffs' Access to the Sealed Classified Document.

On June 21, 2006, the government filed a Motion to Dismiss or, in the Alternative, for Summary Judgment. In this motion, the government asserts the military and state secrets privilege ("state secrets privilege"), arguing that the case should be dismissed or, in the alternative, that summary judgment should be granted in favor of the government based on the privilege. In support of its assertion of the privilege, the government provided unclassified declarations of John D. Negroponte, Director of National Intelligence, and Lieutenant General Keith B. Alexander, Director, National Security Agency. In addition, the government lodged classified materials for *in camera, ex parte* review. Specifically, the government submitted classified declarations of Negroponte and Alexander, as well as classified versions of its memorandum and reply in support of its motion to dismiss, and its opposition to plaintiffs' motion to compel. Plaintiffs objected to the lodging of the materials for *in camera, ex parte* review.

In order to better prepare myself for oral argument, and to assess the government's assertion of the state secrets privilege, I ruled on August 18, 2006 that I would review the government's *in camera, ex parte* materials filed with the Court on June 21, 2006 and July 25, 2006. The Ninth Circuit has noted that it is "unexceptionable" for the government to elaborate on public filings with *in camera* submissions and for judges to review such filings to determine the validity of the claim of privilege. *Kasza v. Browner,* 133 F.3d 1159, 1169 (9th Cir.1998) (collecting cases); *see also United States v. Ott,* 827 F.2d 473, 476–77 (9th Cir.1987) (*ex parte, in camera* review of FISA material does not deprive a defendant of due process). The D.C. Circuit has noted that it is also "well settled" that evaluation of the legitimacy of a state secrets privilege claim should not involve the participation of plaintiff's counsel in the *in camera* examination of putatively privileged material. *Ellsberg v. Mitchell,* 709 F.2d 51, 61 (D.C.Cir.1983) (describing district court and court of appeals inspection of *in camera* submissions). However, since the government had not yet asserted the state secrets privilege at the time of filing the *in camera, ex parte* declarations on April 14, 2006 and May 12, 2006, supporting its opposition to the Oregonian's motion, I declined to review those submissions.

DISCUSSION

I. *The State Secrets Privilege*

[1] The government's assertion of the state secrets privilege is the threshold issue in this case. According to the government, its invocation of the privilege requires that plaintiffs' case be dismissed for several alternative reasons, that it supports the government's motion to prevent plaintiffs' access to the Sealed Document, and that it justifies the denial of the plaintiffs' motion for an order compelling discovery.

The state secrets privilege is a common law evidentiary privilege that allows the government to deny discovery of military and state secrets. *United States v. Reynolds,* 345 U.S. 1, 7–8, 73 S.Ct. 528, 97 L.Ed. 727 (1953); *Kasza,* 133 F.3d at 1165. Once the government properly invokes the privilege, the court's task is to determine whether there is a reasonable danger that national security would be harmed by the disclosure of state secrets. *Kasza,* 133 F.3d at 1166. Once the court is so satisfied, the privilege is absolute. *Id.*

The state secrets privilege does not allow a balancing of necessity to the party seeking disclosure against potential harm from disclosure. *Reynolds,* 345 U.S. at 11, 73 S.Ct. 528; *Kasza,* 133 F.3d at 1166. Indeed, the court must treat the invocation of the privilege with the "utmost deference" and apply a "narrow" scope of review when evaluating the claim. *Kasza,* 133 F.3d at 1166. However, the Supreme Court in *Reynolds* noted that where there is a strong showing of necessity, the assertion of privilege should not be "lightly accepted." *Reynolds,* 345 U.S. at 11, 73 S.Ct. 528.

[2] The state secrets privilege may require dismissal of a case for any of three reasons: (1) if specific evidence must be removed from the case as privileged, but plaintiff can no longer prove the *prima facie* elements of the claim without that evidence; (2) if the defendant is unable to assert a valid defense without evidence covered by the privilege; (3) even if the plaintiff is able to produce nonprivileged evidence, the "very subject matter of the action" is a state secret. *Kasza,* 133 F.3d at 1166.

Courts have characterized outright dismissal of a suit based on the state secrets privilege as a "drastic" and "draconian" remedy. *In re United States,* 872 F.2d 472, 477 (D.C.Cir.1989); *Fitzgerald v. Penthouse Int'l, Ltd.,* 776 F.2d 1236, 1242 (4th Cir.1985). Indeed, one court has noted that "whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter." *Ellsberg,* 709 F.2d at 57. However, courts have recognized that there are inherent limitations in trying to separate classified and unclassified information, comparing contemporary electronic intelligence gathering to the construction of a "mosaic," from which pieces of "seemingly innocuous information" can be analyzed and cobbled together to reveal the full operational picture. *Kasza,* 133 F.3d at 1166 (quoting *Halkin v. Helms,* 598 F.2d 1, 8 (D.C.Cir.1978)).

In attempting to limit the application of the state secrets privilege and allow cases to proceed despite the absence of some privileged information, courts have endorsed the item-by-item *in camera* review of evidence to determine which evidence was properly subject to the state secrets privilege, or have encouraged other procedural innovations to allow trials to proceed while limiting disclosure of information covered by the privilege. *See e.g., In re United States,* 872 F.2d at 479 (item-by-item *in camera* review of evidence for privilege was within the district court's discretion); *Ellsberg,* 709 F.2d at 64 (recognizing that the trial judge had discretion to develop procedural innovations to ensure that the government justifies its privilege); *Hepting v. AT & T Corp.,* 439 F.Supp.2d 974, 1010 (N.D.Cal.2006) (requesting guidance from the parties on how best to carry out the court's duty to disentangle sensitive information from non-sensitive information, including a proposal to appoint a special master to consider classified evidence).

A. *Procedural Invocation of the Privilege*

The parties do not dispute that the government followed the proper steps to invoke the privilege when the heads of the responsible departments lodged a formal claim of privilege. *See Reynolds,* 345 U.S. at 7, 73 S.Ct. 528.

B. *Plaintiffs' Showing of Necessity for the Information*

I must next determine whether plaintiffs have demonstrated a strong showing of necessity for the information over which the government claims the privilege. *Reynolds,* 345 U.S. at 11, 73 S.Ct. 528. While plaintiffs expressly state that they have no need to learn any secret information about the nature and severity of the al Qaeda threat, or about the means and methods of the Surveillance Program, they have asserted a need for information contained in the Sealed Document. According to plaintiffs, the document shows that their communications were intercepted under the Surveillance Program, demonstrating their standing to sue, and "bolstering ... the inference that defendants had the requisite intent for a FISA violation." Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss at 15. Accordingly, plaintiffs need some information in the Sealed Document to establish their standing and a *prima facie* case, and they have no other available source for this information. *See Reynolds,* 345 U.S. at 11, 73 S.Ct. 528. As a result, I cannot "lightly accept" the government's claim of privilege. *Id.*

C. *What Information is Secret*

[3] The government lists four categories of information that it says are implicated by this case, and that it contends must be protected from disclosure: (i) information regarding the al Qaeda threat, (ii) information regarding the Surveillance Program; (iii) information that would confirm or deny whether plaintiffs have been subject to surveillance under the Surveillance Program or under any other government program; and (iv) information pertaining to the Sealed Document.

Prior to determining whether the state secrets privilege requires dismissal of plaintiff's case, I first determine whether this information qualifies as a secret. *Hepting,* 439 F.Supp.2d at 986; *El–Masri v. Tenet,* 437 F.Supp.2d 530, 536 (E.D.Va. 2006), *American Civil Liberties Union v. Nat'l Security Agency,* 438 F.Supp.2d 754, 763 (E.D.Mich.2006).

Taking the second category of information first, I summarize what has been publicly disclosed by official sources about the Surveillance Program. President George W. Bush announced in a radio address that he had authorized the NSA to begin a program to intercept international communications of people with known links to al Qaeda and related terrorist organizations. He explained generally how it works:

> The activities I authorized are reviewed approximately every 45 days. Each review is based on a fresh intelligence assessment of terrorist threats to the continuity of our government and the threat of catastrophic damage to our homeland. During each assessment, previous activities under the authorization are reviewed. The review includes approval by our nation's top legal officials, including the Attorney General and the Counsel to the President. I have reauthorized this program more than 30 times since the September the 11th attacks, and I intend to do so for as long as our nation faces a continuing threat from al Qaeda and related groups.

President's Radio Address (Dec. 17, 2005), *available at* http://www.whitehouse.gov//news/releases/2005/12/20051217.html. It is clear from this description that the government does not seek a warrant prior to intercepting communications under the Surveillance Program.

Two days later, Attorney General Alberto Gonzalez verified that the Surveillance Program intercepts communications where one party to the communication is outside the United States and the government has "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), *available at* http://www.whitehouse.gov//news/releases/2005/12/20051219–1.html.

In addition, the United States Department of Justice issued a 42–page white paper explaining its legal theories in support of the Surveillance Program. *See* U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described By the President* (Jan. 19, 2006), *available at* http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf.

Finally, the public filings in this case disclose other details about the program. Negroponte testifies in his public affidavit, for example, that the NSA utilizes its "SIGINT [signals intelligence] capabilities to collect certain international communications originating or terminating in the United States where there are reasonable grounds to conclude that one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization." Negroponte Unclassified Decl. ¶ 12.

As a result of these official statements and publications, the existence of the Surveillance Program is not a secret, the subjects of the program are not a secret, and the general method of the program—including that it is warrantless—is not a secret. As Judge Walker pointed out in *Hepting,* the government has freely acknowledged that with respect to surveillance of communications content, it has "disclosed the universe of possibilities in terms of *whose* communications it monitors and *where* those communicating parties are located." 439 F.Supp.2d at 996 (emphasis in original).

With regard to the third and fourth categories of information—whether plaintiffs were subject to surveillance and information contained in the Sealed Document—I summarize what has been publicly disclosed. Both the foundation Al–Haramain and one of its directors, Al–Buthi, are "specially designated global terrorists." Plaintiffs Belew and Ghafoor are lawyers who office in the United States and who represent Al–Haramain. Al–Buthi and Sedaghaty are directors of Al–Haramain who are believed to be living overseas, and Al–Buthi is a citizen of Saudi Arabia. Al–Buthi, Sedaghaty, Belew and Ghafoor received a copy of the Sealed Document, among other individuals including a reporter at the Washington Post. As a result of receiving the document, Al–Buthi, Sedaghaty, Belew and Ghafoor know what information the Sealed Document contains, which means they know whether or not the government has conducted electronic surveillance of communications between Al–Haramain's director or directors and Belew and Ghafoor.[3]

Based on this information, plaintiffs could fall within the category of entities subject to the Surveillance Program. Nevertheless, because the government has not officially confirmed or denied whether plaintiffs were subject to surveillance, even if plaintiffs know they were, this information remains secret. Furthermore, while plaintiffs know the contents of the Sealed Document, it too remains secret. As I explain in section III, the government did not waive its state secrets privilege by its inadvertent disclosure of the document.

As for the first category of information, because plaintiffs concede that the al Qaeda threat is irrelevant to their case, and because I decline to consider at this time whether that information is necessary for the government to defend itself (see section II.B.), I decline to determine at this point whether the information is secret.

In summary, as a result of official statements and publications, general information about the Surveillance Program is not a secret. Additionally, while it is not a secret to plaintiffs whether their communications have been intercepted as may be disclosed in the Sealed Document, the government has made no official statement confirming or denying this information and it remains a secret. Finally, I have made no findings about whether specific information about the al Qaeda threat is a secret.

D. *Whether Disclosing the Information Would Cause Harm to the National Security*

[4] Despite the fact that it is not a secret to plaintiffs whether their communications have been intercepted, the government has not confirmed or denied whether plaintiffs have been subject to surveillance, and it claims that to do so would be to disclose matters which should not be divulged due to national security concerns. The government gives several reasons for its conclusion.

The government argues that confirmation or denial of its surveillance of a particular individual might lead that individual to change his pattern of behavior, jeopardizing the ability to collect intelligence information. Negroponte Unclassified Decl. ¶ 13. This rationale does not apply to the Sealed Document; the government already inadvertently disclosed the Sealed Document to plaintiffs, thus alerting the individuals or organizations mentioned in the document that their communications have been intercepted in the past. Even if plaintiffs are not identified in the document, if they engaged in electronic communications during the period of time described in the document, and discussed the subjects identified in the document, they also know whether their communications have been intercepted. Those individuals can be presumed to have already changed their behavior as a result of any information they learned from reading the Sealed Document.

3. I make this conclusion based on plaintiff's allegations and not based on the contents of the Sealed Document.

In addition, the government argues that the NSA cannot publicly confirm or deny whether any individual is subject to surveillance because to do so would tend to reveal information, sources and methods. Again, at least as to the information contained in the Sealed Document, this rationale is irrelevant. Any information, sources or methods disclosed in the Sealed Document has also been revealed to plaintiffs. In addition, plaintiffs claim that this information is irrelevant to their case and will not need to be disclosed to the public, thereby avoiding further disclosure of any state secrets.

Finally, the government contends that even confirming or denying whether an individual has *not* been subject to surveillance would be harmful to national security. "If the NSA denied allegations about intelligence targets in cases where such allegations were false, but remained silent in cases where the allegations were accurate, it would tend to reveal that the individuals in the latter cases were targets." Alexander Unclassified Decl. ¶ 9. This is a valid point, but plaintiffs already know whether their communications have been intercepted, and can argue *in camera,*[4] based on what they believe the Sealed Document reveals, that they were targets. If the Sealed Document does not reflect that plaintiffs were targets, confirming this point says nothing about plaintiffs' target-status generally.

As I have explained, in these particular circumstances, where plaintiffs know whether their communications have been intercepted, no harm to the national security would occur if plaintiffs are able to prove the general point that they were subject to surveillance as revealed in the Sealed Document, without publicly disclosing any other information contained in the Sealed Document.

However, plaintiffs do not know whether or not their communications were intercepted beyond any that may be identified in the Sealed Document, and they do not know whether their communications continue to be intercepted. The government's rationale for wanting to maintain the secrecy of other surveillance events rings true where plaintiffs do not know whether or not their communications have been intercepted. I am convinced that, based on the record as it stands now, forcing the government to confirm or deny whether plaintiffs' communications have been or continue to be intercepted, other than any communications contained in the Sealed Document, would create a reasonable danger that national security would be harmed by the disclosure of state secrets. More details about when, and whose, communications were intercepted, would allow greater insight into the methods used in the Surveillance Program, which might jeopardize the success of the Program if it is legal.

Based on the above, I have determined there is no reasonable danger that the national security would be harmed if it is confirmed or denied that plaintiffs were subject to surveillance, but only as to the surveillance event or events disclosed in the Sealed Document, and without publicly disclosing any other information in the Sealed Document. I have also concluded that disclosing whether plaintiffs were subject to any other surveillance efforts could harm the national security.

II. *Government's Motion to Dismiss or in the Alternative for Summary Judgment*

A. *Whether State Secrets are the "Very Subject Matter of the Action"*

[5] The government argues that the Surveillance Program is the very subject

4. I explain the use of *in camera* affidavits in Section III below.

matter of plaintiffs' action because, it argues, plaintiffs' goal in the litigation is to determine whether the NSA has undertaken warrantless surveillance of them and, if so, whether that action was lawful. The government asserts that litigating these matters will necessarily require and risk the disclosure of state secrets. The government principally relies on *Fitzgerald,* 776 F.2d 1236, *Kasza,* 133 F.3d 1159, and *El–Masri,* 437 F.Supp.2d 530.

Plaintiffs respond that the President and other Executive Branch officials have acknowledged the existence of the Surveillance Program, and that the inadvertent production of the Sealed Document makes the program no longer a secret as applied to plaintiffs.

In *Fitzgerald,* plaintiff claimed published statements about his purported sale of top secret marine mammal weapons systems to other countries was libelous. The court held, "Due to the nature of the question presented in this action and the proof required by the parties to establish or refute the claim, the very subject of this litigation is itself a state secret." *Fitzgerald,* 776 F.2d at 1243. Nevertheless, it was only after the court determined that "there was simply no way this particular case could be tried without compromising sensitive military secrets," that the case was dismissed. *Id.* The court warned that "[o]nly when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal warranted." *Id.* at 1244.

In *Kasza,* former employees at a classified United States Air Force facility claimed violations of the Resource Conservation and Recovery Act ("RCRA"). The Secretary of the Air Force declared that the privilege was necessary to protect ten categories of classified information, including scientific and technological matters, physical characteristics, and environmental data. As a result, plaintiffs could not establish their *prima facie* case and, additionally, "any further proceeding in this matter would jeopardize national security." *Kasza,* 133 F.3d at 1170.

Finally, *El–Masri* involved claims arising from plaintiff's alleged detention pursuant to the Central Intelligence Agency's "extraordinary rendition" program. Despite the fact that the government had confirmed the existence of a rendition program, it had offered no details about "the means and methods employed in these renditions, or the persons, companies or governments involved"—facts put directly at issue by plaintiff's case. *El–Masri,* 437 F.Supp.2d at 537. As a result, "the whole object of the suit and of the discovery is to establish a fact that is a state secret." *Id.* at 539.

In contrast to these cases, the purpose of plaintiffs' suit is not to "establish a fact that is a state secret." *See id.* The government has lifted the veil of secrecy on the existence of the Surveillance Program and plaintiffs only seek to establish whether interception of their communications—an interception they purport to know about—was unlawful. As I explained above, if plaintiffs are able to prove what they allege—that the Sealed Document demonstrates they were under surveillance—no state secrets that would harm national security would be disclosed. Accordingly, while this Court may eventually terminate some or all of plaintiffs' claims, this case should not be dismissed outright because the very subject matter of the case is not a state secret.

B. *Whether Plaintiffs are Unable to Demonstrate Standing or to State a Prima Facie Case, or the Government is Unable to Defend Without Privileged Information*

The government argues that because of the state secrets at issue in this case, plaintiffs must be denied access to the Sealed Document or any further discovery, and, as a result, plaintiffs cannot prove standing or make out a *prima facie* case on their claims. The government, relying on the "mosaic" theory described in *Halkin,* asserts that *any* disclosure of *any* information related to the Surveillance Program or the Sealed Document would tend to allow enemies to discern, and therefore avoid, the means by which surveillance takes place under the program. *see* 598 F.2d at 8. Accordingly, the government argues, plaintiffs' claims must be dismissed.

The government also points to the *Halkin* case for the principle that a number of inferences flow from the confirmation or denial of a particular individual's international communications, including that the individual would know what circuits were used and that foreign organizations who communicated with the targeted individuals would know what circuits were monitored and what methods of acquisition were employed. The government contends that *Halkin* recognized the need to protect against disclosure of information that would confirm or deny alleged surveillance, in part because it might tend to reveal other sensitive, classified information.

Plaintiffs dismiss this argument, scoffing at the mosaic theory in the context of this case where the government has already disclosed information that would trigger the *Halkin* concerns to the surveilled parties, albeit inadvertently. Plaintiffs also argue that the government's justification for the assertion of privilege based on possible disclosure of the nature and severity of the al Qaeda threat and the means and methods of surveillance are inapplicable to this case. They argue that no secret information regarding these issues will need to be addressed in this case, and that the merits issues are purely legal: whether there was an intentional violation of FISA, and whether the 2001 Authorization for Use of Military Force or the President's constitutional power trump FISA. Plaintiffs point out that the government presented these legal arguments already in a January 2006 white paper explaining its legal theories in support of the Surveillance Program, without revealing state secrets.

I decline to decide at this time whether this case should be dismissed on the ground that the government's state secrets assertion will preclude evidence necessary for plaintiffs to establish standing or make a *prima facie* case, or for the government to assert a defense. I recognize that disclosing information regarding the al Qaeda threat or disclosing non-public details of the Surveillance Program may harm national security, but I am not yet convinced that this information is relevant to the case and will need to be revealed.

In addition, based on my ruling that plaintiffs know from the Sealed Document whether their communications were intercepted, plaintiffs should have an opportunity to establish standing and make a *prima facie* case, even if they must do so *in camera.* Since plaintiffs already know a few pieces of the mosaic, I am unable to accept the theory that the release of *any* facts related to the Surveillance Program as applied to these plaintiffs will jeopardize national security. Contrary to *Halkin,* in which the plaintiffs only had proof that their names *may* have been on a watchlist and as a result their communications *may* have been acquired, plaintiffs here purport to have evidence that their communications were intercepted. *See* 598 F.2d at 10–11. Indeed, even the government concedes that "Plaintiffs remain free to make any allegations and assert any arguments in support of their standing, or any other argument, as they deem appropriate, and the Court has the power to review the sealed classified document in order to assess Plaintiffs' claims and arguments." Reply in Supp. of Defs.' Mot. to Prevent Pls.' Access to the Sealed Classified Document at 19.

Nevertheless, I may conclude, after exploring the procedures described in section VII below, that there is no way plaintiffs can prove their case without compromising state secrets, or no possibility that the government can properly defend the allegations.[5] I recognize that the government believes any further proceedings in this case would be futile, but I am just not prepared to dismiss this case without first examining all available options and allowing plaintiffs their constitutional right to seek relief in this Court. *See Spock v. United States,* 464 F.Supp. 510, 519 (S.D.N.Y.1978) ("[a]n aggrieved party should not lightly be deprived of the constitutional right to petition the courts for relief").

C. *Dismissal Based on Statutory Privileges*

The government argues that two statutory privileges also protect the intelligence-related information, sources and methods in this case, requiring the dismissal of the action. It claims that Section 6 of the National Security Act, 50 U.S.C. § 402 prohibits disclosure of any information in this case. That section provides that "nothing in this Act or any other law ... shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof...." 50 U.S.C. § 402. The government makes the same claim for Section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, 50 U.S.C. § 403–1(i)(1), which requires the Director of National Intelligence to protect intelligence sources and methods from unauthorized disclosure.

Plaintiffs argue that neither statutory privilege applies because they are co-extensive with the state secrets privilege, and because plaintiffs' claims can be litigated on the merits without any need to know defendants' secret sources and methods. Plaintiffs point out that none of the cases cited by the government involved the dismissal of a case based on the assertion of one of the statutory privileges.

The statutory privileges at issue here do not direct the dismissal of this action, nor am I yet convinced that they will block evidence necessary to plaintiffs' case. Plaintiffs should have an opportunity to attempt to show standing and a *prima facie* case based on what is currently available to them and any evidence that I have determined is not covered by the state secrets privilege. In proceeding with the discovery process, the government is free to identify discovery requests that fall within these other statutory privileges, and explain specifically why this is so, and I will determine whether the privileges prevent plaintiffs from discovering that specific evidence.

Based on the analysis above, I deny the government's motion to dismiss. I also

5. I note, for example, the fact that the government has claimed the state secrets privilege, in addition to statutory privileges, in answer to plaintiffs' interrogatory requesting information about whether a warrant was obtained. Plaintiffs indicated in oral argument that they would rely on public statements and statements in the Sealed Document to prove the surveillance was warrantless. If after holding the discovery conference discussed in section V, I uphold the government's invocation of the privilege, plaintiffs will have to proceed based on what is publicly disclosed and what they are able to argue *in camera* that the Sealed Document discloses. Simply put, plaintiffs should have an opportunity to make that argument.

deny the government's motion for summary judgment in order to allow plaintiffs to conduct discovery, but I give the government leave to renew its motion.

III. *Defendants' Motion to Deny Plaintiffs' Access to Sealed Document*

[6] The government argues in its Motion to Prevent Plaintiff's Access to the Sealed Document that the document remains classified, regardless of the inadvertent and unauthorized disclosure. *See* Exec. Order No. 12,958, § 1.1(b), *as amended by* Exec. Order No. 13,292 ("Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information."). According to the government, the Executive has sole power to protect classified information. The decision to authorize or deny a security clearance lies exclusively with the Executive, and a district court cannot assess the merits of such a decision. *Dorfmont v. Brown,* 913 F.2d 1399, 1401 (9th Cir.1990). The government further argues that plaintiffs cannot be allowed access to the Sealed Document because such access would carry with it an unacceptable risk of unauthorized disclosure. The government also invokes the state secrets privilege over the document. Finally, the government requests that I order plaintiffs to return to the government all copies of the Sealed Document.

Plaintiffs respond that, under the doctrine of separation of powers, the court has inherent authority to allow access to documents under its control, as the Sealed Document now is. Plaintiffs also argue that if the court rules that they may have access to the Sealed Document, such a decision is subject to judicial immunity. Furthermore, plaintiffs assert that the court has the authority to ensure that the decision to classify a document was not made for the purpose of concealing unlawful conduct, citing cases in which courts have conducted *de novo* review of the classified status of documents.

Plaintiffs correctly point out that the Supreme Court has recognized that district courts have "the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Webster v. Doe,* 486 U.S. 592, 604, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988). Plaintiffs then contend that because defense counsel have access to the Sealed Document, due process requires that plaintiffs' counsel have access as well.

I accept the government's argument that the inadvertent disclosure of the Sealed Document does not declassify it or waive the state secrets privilege. In addition, I am unwilling to use any "inherent authority" of the Court to give plaintiffs access to the document, and I decline at this time to accept plaintiffs' invitation to overrule any classification decision made by the government as to the entire document. The cases plaintiffs rely on in support of their demand that I review *de novo* the reasons for the classification of the Sealed Document caution that courts are to proceed very carefully in reviewing classification decisions and should not "second-guess" classification decisions when the "judiciary lacks the requisite expertise." *See McGehee v. Casey,* 718 F.2d 1137, 1149 (D.C.Cir.1983); *American Library Ass'n v. Faurer,* 631 F.Supp. 416, 423 (D.D.C. 1986) (citing *McGehee*); *ACLU v. Dep't of Defense,* 389 F.Supp.2d 547, 564 (S.D.N.Y. 2005) (within CIA's ken to evaluate the risks of disclosure to intelligence-gathering); *Salisbury v. United States,* 690 F.2d 966, 970 (D.C.Cir.1982) ("accord substantial weight" to classification decision).

The Executive has not granted authority to plaintiffs to review classified materials, and the document remains classified. In addition, if plaintiffs were given full access to the document, plaintiffs may refer back to it and reflect on what it does or does not disclose. For example, they may confirm which modes of communication were vulnerable to interception and avoid those modes. The government has raised sufficient grounds for concern and I grant the government's motion.

At the same time, since the government expressly concedes that "the Court has the power to review the sealed classified document in order to assess Plaintiffs' claims and arguments," I will permit plaintiffs to file *in camera* any affidavits attesting to the contents of the document from their memories to support their standing in this case and to make a *prima facie* case. *See* Reply in Supp. of Defs.' Mot. to Prevent Pls.' Access to the Sealed Classified Document at 19. The government may request that these declarations be deposited in the SCIF.

In addition, I urge the government to consider again whether redactions to the document may be undertaken given my ruling that it is no longer a secret to plaintiffs as to what information the Sealed Document contains. For example, perhaps some of the information in the Sealed Document should be shared with plaintiffs, subject to a protective order, as it is now innocuous, such as the fact of this particular surveillance event, and any dates contained in the document. If it is possible to disentangle those details from whatever else the Sealed Document may reveal about the Surveillance Program more generally, and if this information is necessary to plaintiffs' case, I may want to attempt such an exercise.

Therefore, I grant the government's Motion to Deny Plaintiffs' Access to the Sealed Document in that plaintiffs may not have physical control over the entire document. Plaintiffs may, however, submit affidavits *in camera* to support their standing and to make a *prima facie* case. After exploring possible redactions, I may require that plaintiffs be provided with information that is now no longer "secret," subject to a protective order.

Finally, pursuant to the government's request, I order plaintiffs to deliver to my chambers all copies of the Sealed Document in their possession or under their control.[6] I will contact the government upon receipt of any copies, at which time the government may collect the copies and deposit them in the SCIF.

IV. *Whether FISA Preempts the State Secrets Privilege*

Plaintiffs argue in their opposition both to the government's motion to dismiss and the motion to deny access to the Sealed Document that FISA preempts the state secrets privilege. Specifically, plaintiffs argue that FISA vests the courts with control over materials relating to electronic surveillance, subject to "appropriate security procedures and protective orders." 50 U.S.C. § 1806(f). As a result, plaintiffs contend that Section 1806(f) renders the state secrets privilege superfluous in FISA litigation.

The government responds that Section 1806(f) is inapplicable to this case, because the provision was enacted for the benefit of the government. The government argues that Section 1806(f) authorizes district courts, at the request of the government, to review *in camera* and protect classified information when the government intends to use evidence

6. I note that both Belew and Ghafoor have testified via declaration that they complied fully with the FBI's request to destroy or return all copies of the Sealed Document.

against an individual. Indeed, the government contends, the statute and the case law demonstrate that the "aggrieved person" language is "someone as to whom FISA surveillance has been made known, typically in a criminal proceeding." Defs.' Reply in Supp. of Mot. to Dismiss/Summ. J. at 18. In this case, it argues, where the threshold question of whether or not plaintiffs have been subject to surveillance is itself a state secret, plaintiffs cannot use FISA to confirm their belief. In addition, the government argues, there is no clear congressional statement to overturn the privilege.

[7] The relevant inquiry in deciding whether a statute preempts a federal common law privilege[7] is whether the statute speaks directly to the question otherwise answered by federal common law. *Kasza*, 133 F.3d at 1167. There is a presumption in favor of the privilege "except when a statutory purpose to the contrary is evident." *Id.*

The language of § 1806(f) is broad, providing, in relevant part:

> Whenever a court ... is notified pursuant to subsection (c) or (d) of this section [describing occasions when the government intends to use information obtained through surveillance], or whenever a motion is made pursuant to subsection (e) [motion to suppress], or **whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States** ... to **discover** or obtain applications or orders or other **materials relating to electronic surveillance** or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter, the United States district court ... shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would **harm the national security of the United States,** review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted.

50 U.S.C. § 1806(f) (emphasis added). The provision goes on to state that:

> In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

Id.

"Aggrieved person" is defined by the statute to mean, "a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance." 50 U.S.C. § 1801(k). Finally, under Section 1810, "An aggrieved person, other than a foreign power or an agent of a foreign power, ... who has been subjected to an electronic surveillance ... in violation of section 1809 [engages in electronic surveillance except as authorized by statute] shall have a cause of action against any person who committed such violation...." 50 U.S.C. § 1810.

7. The government argues that the state secrets privilege is also *constitutionally*-based, deriving from the President's "most basic constitutional duty" to protect the Nation from armed attack, and suggests a different method of evaluating whether FISA preempts the state secrets privilege. Specifically, according to the government, Congress must set forth a "clear statement" that it intended to intrude on powers of the Executive. *United States v. Bass,* 404 U.S. 336, 350, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971).

To summarize, Section 1810 gives a private right of action to an "aggrieved person," so long as the person is not a foreign power or an agent of a foreign power. An "aggrieved person" is someone whose communications have been subject to surveillance. Pursuant to Section 1806(f), a plaintiff, if he is able to show he is an "aggrieved person," may seek "to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter [FISA]." Upon an affidavit from the Attorney General that "disclosure or an adversary hearing would harm the national security of the United States," the court may review *in camera* and *ex parte* "the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." To accept the government's argument that Section 1806(f) is only applicable when the government intends to use information against a party would nullify FISA's private remedy and would be contrary to the plain language of Section 1806(f).

The question then becomes whether Section 1806(f) preempts the state secrets privilege. I decline to reach this very difficult question at this time, which involves whether Congress preempted what the government asserts is a constitutionally-based privilege. Given that the government has already permitted the court to review the Sealed Document *in camera* and has expressly conceded that I may evaluate plaintiffs' claims based on my review of that document, I need not resolve this question presently.

V. *Plaintiffs' Motion for Order Compelling Discovery*

Plaintiffs' Motion for Order Compelling Discovery seeks responses from the government to interrogatories. The interrogatories request answers to whether electronic surveillance was conducted of Al-Haramain or its director and counsel, dates of such surveillance, and whether the FISA court issued warrants for such surveillance. The interrogatories also seek information about the classification of the Sealed Document, including what date the decision to classify it as SCI was made, what officials made that decision, and the reason for that classification.

The government makes substantially the same arguments in support of its opposition to plaintiffs' motion to compel discovery as it does in its memorandum in support of its motion to dismiss. It argues that it has not acknowledged the specific surveillance alleged in this case, even if it has acknowledged the Surveillance Program more generally, and that it cannot respond to the interrogatories because all possible answers would be subject to the state secrets privilege.

Given my rulings that it is no longer secret to plaintiffs whether their communications were intercepted as described in the Sealed Document, and that there would be no harm to national security if plaintiffs' general allegations were confirmed or denied as to that specific circumstance, I will hold a discovery conference to determine to which interrogatories plaintiffs need answers, and to which interrogatories the government should be required to respond. I may require the government to provide specific responses to the interrogatories for *in camera, ex parte* review on an item-by-item basis as was generally approved by *In re United States. See* 872 F.2d at 478. Nevertheless, I will ensure that further steps in the discovery process are taken with the Supreme Court's caution in mind; the claim of privilege is accorded the "utmost deference," unless a court is not satisfied under the particular circumstances of the case that "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Reynolds,* 345 U.S. at 10, 73 S.Ct. 528.

As a result, I deny Plaintiffs' Motion for Order Compelling Discovery, with leave to renew after the discovery conference.

VI. *Oregonian's Motion to Unseal Records*

[8] The Oregonian argues in its motion to unseal records that there is a strong presumption supporting access to court records, and that a court must state the compelling interest requiring an order to seal, "along with findings specific enough so that a reviewing court can determine whether the closure order was properly entered." *Oregonian Publishing Co. v. United States Dist. Ct. for the Dist. of Or.,* 920 F.2d 1462, 1464 (9th Cir.1990). The Oregonian suggests that even if the Sealed Document is classified, sealing of the document may be inappropriate if it is possible to redact only the few lines that require confidential treatment. *United States v. Ressam,* 221 F.Supp.2d 1252, 1263–64 (W.D.Wash.2002). The newspaper argues that the Sealed Document should be unsealed because no compelling interest supports further sealing and, in any event, any interest is outweighed by the constitutional and common law rights of public access to court documents.

The government responds that the document was and remains classified as SCI and "TOP SECRET," notwithstanding its inadvertent disclosure to the plaintiffs, and that the Executive has sole authority to classify or declassify information.[8] The government further asserts that before the court evaluates whether a compelling interest requires continued protection of a document, the court must first address whether the place and process have historically been open to the press and general public and whether public access plays a significant positive role in the functioning of the particular process in question. *Phoenix Newspapers, Inc. v. United States Dist. Ct. for the Dist. of Arizona,* 156 F.3d 940, 946 (9th Cir.1998). Here, according to the government, the Sealed Document remains a classified document of the sort to which the press or public have historically not had access.

Given my decision above that the inadvertent disclosure of the Sealed Document does not declassify it or waive application of the state secrets privilege, I must deny the Oregonian's Motion to Unseal Records. Even if the document were one to which the press or public have historically had access by virtue of its being filed with the Court, the government has asserted a compelling national security interest that overrides any public interest in the document. While I may entertain the possibility that plaintiff may have access to any innocuous information in the document based on the fact that it is no longer secret to them, and subject to a protective order, the document contains highly classified information that must not be disclosed to the public.

VII. *Further Proceedings*

I will schedule a discovery conference at which the parties should be prepared to discuss the following issues: possible redactions to the Sealed Document, possible stipulations, item by item review of interrogatory requests to consider whether *in*

8. On April 14, 2006, the government submitted a Classified Declaration in Opposition to Oregonian Publishing Company's Motion to Intervene and Unseal Records, and on May 12, 2006, the government filed a Superseding Classified Declaration. I have not reviewed either of these declarations submitted *in camera* and *ex parte.*

camera responses would be appropriate, depositions, hiring an expert to assist the Court in determining whether any of these disclosures may reasonably result in harm to the national security, and any other appropriate discovery issues. The parties should confer on a few mutually convenient dates and times and contact the Court to reserve a time.

VIII. *Certification for Appeal*

Since I recognize, as did Judge Walker in *Hepting,* that my rulings on the Motion to Dismiss or, in the Alternative, for Summary Judgment and Motion to Prevent Plaintiffs' Access to the Sealed Classified Document "involve[ ] a controlling question of law" about which there is "substantial ground for difference of opinion," and since "an immediate appeal from the order may materially advance the ultimate termination of this litigation," I certify these rulings for immediate appeal. 28 U.S.C. § 1292(b). If the parties choose to appeal, and if the appeal is taken, the parties may move to stay proceedings in the district court.

CONCLUSION

The government's Motion to Dismiss or, in the Alternative, for Summary Judgment (# 58) is denied, but the government has leave to renew its Motion for Summary Judgment. The government's Motion to Prevent Plaintiffs' Access to the Sealed Classified Document (# 39) is granted. Plaintiffs' Motion for Order Compelling Discovery (# 35) is denied with leave to renew. Oregonian Publishing Company's Motion to Intervene was previously granted, but its Motion to Unseal Records (# 7) is denied.

IT IS SO ORDERED.

WEST KEY NUMBER SYSTEM

CITY OF MOSES LAKE, a Washington municipal corporation, Plaintiff,

v.

THE UNITED STATES OF AMERICA, et al., Defendants.

No. CV–04–0376–AAM.

United States District Court,
E.D. Washington.

Dec. 30, 2005.

Background: City brought action against United States and others to recover for trichloroethylene (TCE) contamination of wells on land purchased from United States. United States moved to dismiss Federal Tort Claims Act (FTCA) claims as time barred.

Holdings: The District Court, McDonald, Senior District Judge, held that:

(1) city's permanent tort claims accrued, and two-year period for presenting tort claim to agency began to run, when city discovered the contamination;

(2) tolling agreement with United States could not save the claims; and

(3) the period was not equitably tolled.

Motion granted.

1. Federal Courts 🔑34

When ruling on motion that makes facial attack on subject matter jurisdiction, the court must consider the allegations of the complaint to be true. Fed.Rules Civ. Proc.Rule 12(b)(1), 28 U.S.C.A.

2. Federal Courts 🔑33

When ruling on a "speaking motion" which attacks subject matter jurisdiction as a matter of fact, court is not limited to the allegations in the complaint, but can consider extrinsic evidence and weigh it if disputed, and if the jurisdictional issue is